Accommodating Nazi Tyranny? The Wrong Turn of the Social Democratic Legal Philosopher Gustav Radbruch After the War

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I. The Virtues in Natural Law: Radbruch's Misuse of Natural Law after World War II

What is the relationship between Nazism and natural law—the notion of universal standards, which arise from either God, revelation, nature, rationality, or morality, and which human-made statutes cannot break? In 1946, in the wake of World War II, Gustav Radbruch, one of Germany's most respected Social Democrats and legal philosophers, published his influential article, "Statutory Injustice and Suprastatutory Law," which grappled with a pressing issue of postwar justice.[1] Should courts deem judges criminally responsible for having earlier convicted defendants, and often sentenced them to death, based on denunciations by family, neighbors, or rivals, denunciations that the Nazi regime had encouraged but that a fair-minded government must condemn? As a matter of jurisprudence, Radbruch set

1. Gustav Radbruch, "Gesetzliches Unrecht und Übergesetzliches Recht," *Süddeutsche Juristen-Zeitung* 1 (1946): 105–8, reprinted in Radbruch, *Rechtsphilosophie*, 8th ed., ed. Erik Wolf und Hans-Peter Schneider (Stuttgart: K. F. Koehler, 1973), 347–57.

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forth his famous formula, which declared that judges must adhere to positive or statutory law, except in rare circumstances in which such law violated fundamental principles of justice. In his words, "[P]ositive law, secured through legislation and power, prevails, even if it is substantively unjust and inexpedient, unless the tension between positive law and justice reaches such an intolerable level that the law as 'false law' must yield to justice."[2] As a matter of history, Radbruch excused Nazi-era judges who had missed his jurisprudential point, because they had succumbed to the legal theory of positivism that had long permeated German legal thinking. "Positivism," Radbruch wrote, "with its belief that 'law is law' rendered the German judiciary defenseless against arbitrary and criminal laws."[3]

Radbruch's analysis of the nature of judicial accountability was so stimulating and his reputation so impressive that even a decade later the Anglo-American law professors H. L. A. Hart and Lon Fuller engaged his arguments in their celebrated debate about whether legal theory should rest on positivism or natural law.[4] In Germany itself, Radbruch's analysis stamped postwar legal thinking, influencing judicial decisions involving alleged crimes committed in Nazi Germany and also in East Germany, and

2. Ibid., 353; see also Gustav Radbruch, "Die Erneuerung des Rechts" (1947), in *Naturrecht oder Rechtspositivismus?* ed. Werner Maihofer (Darmstadt: Wissenschaftliche Buchgesellschaft, 1962), 1–10; Gustav Radbruch, "Fünf Minuten Rechtsphilosophie," *Rhein-Neckar-Zeitung* (September 12, 1945), in Radbruch, *Rechtsphilosophie*: 327–29; Gustav Radbruch, "Gesetz und Recht" (1947), in Gustav Radbruch, *Gesamtausgabe: Rechtsphilosophie*, Band 3, ed. Arthur Kaufmann (Heidelberg: C. F. Müller Juristischer Verlag, 1990), 96–100; see generally Albrecht Langner, *Der Gedanke des Naturrechts seit Weimar und in der Rechtsprechung der Bundesrepublik* (Bonn: H. Bouvier, 1959), 165. This translation and all others are my own unless otherwise noted.

3. Radbruch, "Gesetzliches Unrecht," 352; see also, ibid., 347, 354–56; Radbruch, "Die Erneuerung des Rechts," 2; Radbruch, "Fünf Minuten Rechtsphilosophie," 327; Radbruch, "Gesetz und Recht," 96; Gustav Radbruch, "Vorschule der Rechtsphilosophie: Nachschrift einer Vorlesung" (1947), reprinted in Gustav Radbruch, *Gesamtausgabe*, Vol. 3: *Rechtsphilosophie III*, ed. Harald Schubert and Joachim Stoltzenburg (Heidelberg: C.F. Müller, 1990), 127–227; see generally Thomas Mertens, "Nazism, Legal Positivism and Radbruch's Thesis on Statutory Injustice," *Law and Critique* 14 (2003): 277–95; and Stanley L. Paulson, "Lon L. Fuller, Gustav Radbruch, and the 'Positivist' Theses," *Law and Philosophy* 13 (1994): 313–59, 327.

4. Lon L. Fuller, "Positivism and Fidelity to Law—A Reply to Professor Hart," *Harvard Law Review* 71 (1958): 630–72; H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review* 71 (1958): 593–629; see also Brian H. Bix, "Radbruch's Formula and Conceptual Analysis," *American Journal of Jurisprudence* 56 (2011): 45–57, 48–49; and Kenneth F. Ledford, "Judging German Judges in the Third Reich: Excusing and Confronting the Past," in *The Law in Nazi Germany: Ideology, Opportunism, and the Perversion of Justice*, ed. Alan E. Steinweis and Robert D. Rachlin (New York, Oxford: Berghahn, 2013), 161–189.

generating a steady stream of scholarship, which has not yet abated.[5] In the mid- to late 1940s, his arguments came as a godsend to those German judges who had recently served under the Nazi regime. Adopting his reasoning, they bemoaned their own plight during the Nazi years, and found themselves blameless then, when an all-pervasive positivism had entrapped their thinking. And they congratulated themselves on their newfound devotion to natural law.[6] Not all expressed themselves with Radbruch's grace. In 1950, 5 years after foreign armies had liberated inmates from Auschwitz to Dachau, the law professor Rudolf Smend, who had spent the Nazi era teaching law at the University of Göttingen, praised his fellow jurist Erich Kaufmann for challenging positivism back in 1921, and thus for assuming the historic task of "liberating" a generation that then "still stood in the wasteland where positivism had led us . . . and that faced the punishment of automatic loss of scholarly respect for every attempt to escape this concentration camp."[7]

Even though Radbruch never developed the concept of something beyond positive law into a systematic theory,[8] his commitment to the role

5. See Fritz Bauer, "Das 'gesetzliche Unrecht' des Nationalsozialismus und die deutsche Strafrechtspflege," in *Gedächtnisschrift für Gustav Radbruch, 21. 11. 1878–23. 11. 1949,* ed. Arthur Kaufmann (Göttingen: Vandenhoeck & Ruprecht, 1968), 302–7; Bix, "Radbruch's Formula," 49–50; and Markus Dirk Dubber, "Judicial Positivism and Hitler's Injustice," *Columbia Law Review* 93 (1993): 1807–32, 1807–08; Mertens, "Nazism," 292–95; Paulson, "Fuller, Radbruch," 317, 317–318 fn. 11; Stanley L. Paulson, "Radbruch on Unjust Laws: Competing Earlier or Later Views?" *Oxford Journal of Legal Studies* 15 (1995): 489–500, 491–92; Giuliano Vassalli, *Radbruchsche Formel und Strafrecht: Zur Bestrafung der "Staatsverbrechen" im postnazistischen und postkommunistischen Deutschland* (Berlin: DeGruyter, 2010); and Manfred Walther, "Hat der juristische Positivismus die deutschen Juristen im 'Dritten Reich' wehrlos gemacht? Zur Analyse und Kritik der Radbruch–These," in *Recht und Justiz im "Dritten Reich"*, ed. Ralf Dreier and Wolgang Sellert (Frankfurt am Main: Suhrkamp, 1989), 323–54, 346–47.

6. For example, Maihofer, *Naturrecht*; Hubert Schorn, *Der Richter im Dritten Reich: Geschichte und Dokumente* (Frankfurt am Main: V. Klostermann, 1959); Hermann Weinkauff, *Die deutsche Justiz und der Nationalsozialismus: Ein Überblick* (Stuttgart: Dt. Verl.-Anst., 1968); see also Ledford, "Judging German Judges," 171–73; Ingo Müller, *Hitler's Justice: the Courts of the Third Reich* (Cambridge, MA: Harvard University Press, 1991), 219–25, 276; Paulson, "Fuller, Radbruch," 357–59; and Walther, "Hat der juristische Positivismus," 348–51.

7. Rudolf Smend, "Zu Erich Kaufmannns wissenschaftlichem Werk," in *Um Recht und Gerechtigkeit: Festgabe für Erich Kaufmann zu seinem 70. Geburtstag* (Stuttgart und Cologne: Kohlhammer, 1950), 395, as quoted in Langner, *Der Gedanke des Naturrechts,* 50, and Manfred Friedrich, "Erich Kaufmann (1880–1972): Jurist in der Zeit und jenseits der Zeiten," in *Deutsche Juristen jüdischer Herkunft*, ed. Helmut Heinrichs, Harald Franzki, Klaus Schmalz, and Michael Stolleis (Munich: C. H. Beck, 1993), 693–704, 699.

8. Erik Wolf, "Einleitung des Herausgebers: Gustav Radbruchs Leben und Werk," in Gustav Radbruch, *Rechtsphilosophie*, 71; see also Kristian Kühl, "Rückblick auf die Renaissance des Naturrechts nach dem 2. Weltkrieg," in *Geschichtliche Rechtswissenschaft: Ars Tradendo Innovandoque Acquitatem Sectandi. Freundesgabe für*

of some form of natural law was emphatic: "a law higher than statutes, natural law, God's law, rational law, in short a suprastatutory law by which measure injustice remains injustice even if cast into the form of statutes."[9] But the impulse of German jurists after the war, encouraged by Radbruch, to construe the Nazi legal system through the lens of natural law is ironic. While as a matter of jurisprudence, his turn toward natural law was provocative, as a matter of history, his blaming positivism for the failings of Nazi-era judges was simply wrong. Scholars of German legal history have made the point. Nazi legal doctrine was antipositivistic, and positivism did not drive judicial decision making during the Nazi era. To the contrary, German judges (purged of Jewish and Social Democratic colleagues) accommodated their legal reasoning to Nazism, whether servilely, eagerly, or fervently. They sympathized with its ideology, approved its political direction, and exercised their judicial discretion accordingly. As a practical matter, they supported the Nazi regime.[10] Thus, a historical mistake such as Radbruch's helped pollinate a postwar German fascination with natural

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Alfred Söllner zum 60. Geburtstag, ed. Gerhard Köbler, Meinhard Heinze, Jan Schnapp, and Alfred Söllner (Giessen: Brühler Verlag, 1990), 331–57, 336–37; Paulson, "Fuller, Radbruch," 320; Paulson, "Radbruch on Unjust Laws," 497–98; and Christoph M. Scheuren-Brandes, *Der Weg von Nationalsozialistischen Rechtslehren zur Radbruchschen Formel: Untersuchungen zur Geschichte der Idee vom "Unrichtigen Recht"* (Paderborn: Ferdinand Schöningh, 2006), 24–27.

9. Radbruch, "Die Erneuerung des Rechts," 2; see also Radbruch, "Fünf Minuten Rechtsphilosophie," 328; Radbruch, "Gesetz und Recht," 96, 99; Gustav Radbruch, "Privatissimum der Rechtspflege" (1947), in Gustav Radbruch, *Gesamtausgabe: Rechtsphilosophie*, Band 14, ed. Arthur Kaufmann (Heidelberg: C. F. Müller Juristischer Verlag, 2002), 150–53, 152; Gustav Radbruch, *Rechtsphilosophie,* 5th ed. (Stuttgart: Koehler, 1956), 106; and Radbruch, "Vorschule," 226.

10. Peter C. Caldwell, "Legal Positivism and Weimar Democracy," *American Journal of Jurisprudence* 39 (1994): 273–301, 277; Horst Dreier, "Die Radbruchsche Formel – Erkenntnis oder Bekenntnis?" in *Staatsrecht in Theorie und Praxis: Festschrift Robert Walter zum 60. Geburtstag*, ed. Heinz Mayer (Vienna: Manz, 1991), 117–135, 120–27; Langner, *Der Gedanke des Naturrechts,* 59–64; 72–79; Mertens, "Nazism," 282–86, 293; Müller, *Hitler's Justice*; Ulfrid Neumann, "Naturrecht und Politik zwischen 1900 und 1945: Naturrecht, Rechtspositivismus und Politik bei Gustav Radbruch," in *Naturrecht und Politik*, ed. Karl Graf Ballestrem (Berlin: Duncker & Humblot, 1993), 69–85, 72; Walter Ott and Franziska Buob, "Did Legal Positivism Render German Jurists Defenceless during the Third Reich?" *Social & Legal Studies* 2 (1993): 91–104, 98–102; Paulson, "Fuller, Radbruch," 315, 323–24, 331–33; Robert D. Rachlin, "Roland Freisler and the Volksgerichtshof: The Court as an Instrument of Terror," in Steinweis and Rachlin, *The Law in Nazi Germany*, 63–87, 69–71; Wolf Rosenbaum, *Naturrecht und positives Recht: Rechtssoziologische Untersuchungen zum Einfluss der Naturrechtslehre auf die Rechtspraxis in Deutschland seit Beginn des 19. Jahrhunderts* (Neuweid: Luchterhand, 1972), 131–32, 146–51; Bernd Rüthers, *Die unbegrenzte Auslegung: Zum Wandel der Privatrechtsordnung im Nationalsozialismus* (Tübingen: Mohr, 1968); Bernd Rüthers,

law thinking, which served the purposes of judges who had once happily furthered Nazi discrimination, terror, and murder.

Radbruch's historical mistake invites a historical inquiry. What have scholars of his postwar jurisprudence about judicial accountability discussed and what have they neglected? They have focused on doctrinal questions about the relative merits of theories of natural law versus legal positivism, but they have ignored historical questions about the origins of Radbruch's postwar jurisprudence in the Nazi era itself. In regard to doctrinal questions, scholars have debated whether Radbruch abandoned a pre-Nazi positivism for a post-Nazi natural law theory. The more compelling answer is that he shifted emphasis. Before the Nazi era, he was a positivist, albeit one unusually alert to nuance and contradictions. He developed a tripartite theory. Judges, according to the 1932 edition of his magnum opus on legal philosophy (*Rechtsphilosophie*), must apply laws with due consideration to the three legal concepts of certainty, purpose, and justice, with certainty and purpose prevailing over justice. After the war, Radbruch recalibrated the scales. He gave new, and, on occasion, decisive, weight to justice.[11]

Despite extensive debate on these doctrinal issues, few postwar scholars have noticed the historical dilemma. How could this jurist—who before the Nazi era was one of Germany's leading legal philosophers and during it remained in Germany and was able to observe events close up—have wound up reconstruing the role of justice by so badly misconstruing Nazi legal history? How could he have erred so badly in arguing that Nazi legal practice reflected the errors of legal positivism prevailing over natural law? Admiring Radbruch's intelligence, morality, and sincerity, scholars have struggled with his jurisprudence before and after the Nazi

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Entartetes Recht: Rechtslehren und Kronjuristen im Dritten Reich (Munich: C. H. Beck, 1988); and Walther, "Hat der juristische Positivismus," 333–39, 341–44.

11. Bix, "Radbruch's Formula," 47–48; Dreier, "Die Radbruchsche Formel," 129; Frank Haldemann, "Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law," *Ratio Juris* 18 (2005): 162–78, 164–65, 167; Winfried Hassemer, "Einführung," in Gustav Radbruch, *Gesamtausgabe, Vol. 3: Rechtsphilosophie III*, ed. Winfried Hassemer (Heidelberg: C.F. Müller, 1990), 1–16; Arthur Kaufmann, "Die Naturrechtsrenaissance der ersten Nachkriegsjahre – und was daraus geworden ist," in *Die Bedeutung der Wörter: Festschrift für Sten Gagnér zum 70. Geburtstag*, ed. Michael Stolleis, zusammen mit Monika Frommel, Joachim Rückert, and Sten Gagnér (Munich: C. H. Beck, 1991), 105–32, 118–19; Ulfrid Neumann, "Naturrecht und Politik," 77; Paulson, "Fuller, Radbruch," 315–23, 339–40; Stanley L. Paulson, "On the Background and Significance of Gustav Radbruch's Post-War Papers," *Oxford Journal of Legal Studies* 26 (2006): 17–40, 18–20, 39; Paulson, "Radbruch on Unjust Laws"; Scheuren-Brandes, *Der Weg von Nationalsozialistischen Rechtslehren*, 22; and Ian Ward, *Law, Philosophy and National Socialism: Heidegger, Schmitt and Radbruch in Context* (Bern, New York: P. Lang, 1992), 184–85.

era, and the significance of its changes, but they have not wondered what caused a historical mistake embedded in his postwar jurisprudence. They have not asked whether that mistake could serve as a wedge to open an inquiry into how Radbruch changed his legal thinking. They have sprung too nimbly from before to after the Nazi era, losing sight of the effect of the intervening Nazi years themselves.

The omission is not surprising if one takes the measure of Radbruch's prominence—reaching far enough to garner respect, but falling short of generating a critical scholarly biography.[12] But even a thumbnail sketch of his life in the Nazi era should arouse curiosity. Although he was among the first non-Jewish German academics to lose his job, stripped of his professorship in Heidelberg in May 1933 because he was a Social Democrat; although he withdrew into his private life, but remained in Germany throughout the Nazi era, except for a year abroad at Oxford in 1935–36; although he wrote scholarly works, not only on law but also on literary topics; and although he hardly compromised his integrity, he could not have lived encased in a shell.[13] In his post-Nazi re-evaluation of his pre-Nazi thinking, did he grapple with his Nazi era political stance? How did his immediate circumstances during the Nazi era affect his political thinking?

These last two questions shift attention from Radbruch's jurisprudence to his political thinking, even if one source of his political thinking remains his jurisprudence. To measure his postwar reconsideration of natural law in terms of politics rather than jurisprudence, the relevant earlier writing is not the 1932 edition of his *Rechtsphilosophie*, which almost all commentators use, but his lecture in Lyon, France, published in 1934 under the title "Relativism in Legal Philosophy."[14] In that article, Radbruch made an

12. See Michael Gottschalk, "Gustav Radbruchs Heidelberger Jahre 1926–1949" (Diss., University of Kiel, 1982); Arthur Kaufmann, *Gustav Radbruch: Rechtsdenker, Philosoph, Sozialdemokrat* (Munich: Piper, 1987); Hans-Peter Schneider, "Gustav Radbruch (1878–1949): Rechtsphilosoph zwischen Wissenschaft und Politik," in *Streitbare Juristen,* ed. Kritische Justiz (Baden-Baden: Nomos, 1988), 295–306; and Wolf, "Einleitung."

13. *See* Gottschalk, "Gustav Radbruchs," 73–74; Wilfried Küper, "Gustav Radbruch als Heidelberger Rechtslehrer," in *Heidelberger Strafrechtslehrer im 19. und 20. Jahrhundert,* ed. Wilfried Küper (Heidelberg: V. Decker & Müller, 1986): 225–241, 245; Paulson, "Fuller, Radbruch," 346; Paulson, "On the Background," 24–25; Gustav Radbruch, *Der innere Weg: Aufriss meines Lebens* (Stuttgart: K. F. Koehler, 1951), 185–86; and Wolf, "Einleitung," 56–57, 61–63, 65.

14. Gustav Radbruch, "Der Relativismus in der Rechtsphilosophie" (1934), in *Gesamtausgabe: Rechtsphilosophie*, Band 3, Arthur Kaufmann, ed. (Heidelberg: C. F. Müller Juristischer Verlag, 1990): 17–22; see generally Bauer, "Das 'gesetzliche Unrecht,'" 302–3; Hassemer, "Einführung," 11–12.

impassioned plea for liberal democracy. Answering critics who belittled relativists as lacking character and conviction,[15] Radbruch denied, on the one hand, that a natural law existed that consisted of "a clear, recognizable and provable juristic truth,"[16] but insisted, on the other hand, that relativism reconciles mutual respect with moral commitment.[17] One by one, he tied relativism to a series of other ideals: positivism, liberalism, the rule of law (*Rechtsstaat*), the separation of powers, equality, socialism, democracy, and tolerance for all opinions (except the intolerance that would destroy democracy[18]). He ended on a note of scholarly delight. Starting from skeptical foundations and developing his argument logically step by step, he had wound up justifying the substantive demands of classical natural law: the ideals of the French Revolution.[19] More than anything else that he would write in the next decade, Radbruch used jurisprudence in this article to serve a political position. He made a legal argument and advanced a political goal that did not rely on natural law.

What happened? What pushed Radbruch's jurisprudence and political thinking—his political jurisprudence—toward natural law?

II. History and Jurisprudence: The Political Origins of Radbruch's Post-War Revival of Natural Law

The biographical data indicate that Radbruch's emotional experience of the Nazi era influenced him—and inspired his renewed interest in natural law—in three ways. Although all three are important, the third will merit the most detailed exploration.

First, as the German law professor Manfred Walther has perceptively suggested, Radbruch misinterpreted Nazi legal history in a process of self-criticism. In developing his postwar position, Radbruch was criticizing his own pre-Nazi era views as excessively positivistic, and he then wrongly imputed such legal positivism more broadly to Nazi judges.[20] His misinterpretation more likely arose from self-criticism than from any contemporaneous observation. During the Nazi era itself, Radbruch did not write about judicial proceedings, either by attending them or studying them.[21] Thus,

15. Radbruch, "Der Relativismus," 17.
16. Ibid.
17. Ibid., 17–18.
18. Ibid., 21.
19. Ibid., 21–22.
20. Walther, "Hat der juristische Positivismus," 339–41.
21. See Gustav Radbruch, *Briefe II (1919–1949)*, revised by Günter Spendel, in *Gesamtausgabe*, Band 18, Arthur Kaufmann, ed. (Heidelberg: C. F. Müller Juristischer Verlag, 1995): 104–240.

his own guilt feelings may have led him astray about the role of positivism in the Nazi legal system.

In a second transformation during the Nazi years, Radbruch became more religious.[22] Although from 1937 through 1939 he wrote friends that he lived increasingly for his two children's sake,[23] their untimely deaths—his 23-year-old daughter died in a ski accident in 1939 and his 23-year-old son fell on the Eastern Front in 1942—intensified his religiosity.[24] Perhaps he also became more religious because, by the early 1940s, he experienced more and more impairments from Parkinson's disease.[25] When the war ended, he hoped for a new Christian socialism and lent his hand to formulating a program for an imagined Christian Socialist Union.[26] Although he soon turned away from such a political party, his new religiosity attuned him to natural law thinking. He had come to believe that human beings were inherently religious and that those in the West were naturally Christian,[27] and he repeatedly referred to the contribution of religious thinking to jurisprudence.[28] A bitter lesson of the Nazi years, Radbruch wrote in one essay, was "[h]ow weak justice is that lacks religious consecration."[29] He juxtaposed religion, which he favored, to power, which he feared.[30] Thus,

22. Gottschalk, "Gustav Radbruchs," 116–23; Radbruch, *Der innere Weg*, 188, 192–93; Scheuren-Brandes, *Der Weg von Nationalsozialistischen Rechtslehren*, 27–29; Wolf, "Einleitung," 62–67; see generally Richard Hauser, "Die verborgene Lebenslinie: Gustav Radbruch und die Religion," in A. Kaufmann, *Gedächtnisschrift*, 50–59; Ward, *Law, Philosophy and National Socialism*, 188–89; and Erik Wolf, "Revolution or Evolution in Gustav Radbruch's Legal Philosophy," *Natural Law Forum* 3 (1958): 1–23, 21–22.

23. Letter of February 24, 1937, to Walter and Bertel Götz, in Radbruch, *Briefe II*: 138; Letter of April 15, 1938, to Hermann Stolterfoht, in ibid., 148; and Letter of January 24, 1939, to Martin Drath, in ibid., 152.

24. Radbruch, *Der innere Weg*, 189, 191; see also Gottschalk, "Gustav Radbruchs," 113–16, 121; A. Kaufmann, *Gustav Radbruch*, 141–45; and Wolf, "Einleitung," 64–65.

25. Radbruch, *Briefe II*, 170, 208–11; see also Gustav Radbruch, *Lebensbeschreibung*, in A. Kaufmann, *Gedächtnisschrift*: 21–25, 24; and A. Kaufmann, *Gustav Radbruch*.

26. See Gustav Radbruch, "Neue Parteien – Neuer Geist" (December 1, 1945) in *Gesamtausgabe: Staat und Verfassung*, Band 14, revised by Hans-Peter Schneider and Arthur Kaufmann, eds. (Heidelberg: C. F. Müller Juristischer Verlag, 2002): 68–70; see also Hans De With, ed., *Gustav Radbruch: Reichsminister der Justiz – Gedanken und Dokumente zur Rechtspolitik Gustav Radbruchs aus Anlass der hundersten Wiederkehr seines Geburtstages* (Cologne: Bundesanzeiger Verlages, 1978): 54–55.

27. See Gottschalk, "Gustav Radbruchs," 120–23.

28. For example, Radbruch, "Die Erneuerung des Rechts," 6–7, 9; Radbruch, "Gesetzliches Unrecht," 353; Radbruch, "Gesetz und Recht," 105–6; Gustav Radbruch, "Gerechtigkeit und Gnade" (1949), in Radbruch, *Rechtsphilosophie*, 329–35.

29. Radbruch, "Die Erneuerung des Rechts," 9.

30. Gustav Radbruch, "Des Reichsjustizministeriums Ruhm und Ende zum Nürnberger Juristen-Prozess," in *Süddeutsche Juristenzeitung* (1948), reprinted in Hans de With, ed.,

Radbruch may have revised his attitude toward natural law as a result of his newly awakened religious beliefs as much as from philosophical considerations.

A third character trait—to which this article pays the most attention—flags a problem in Radbruch's postwar vision of the relationship between Nazism and natural law. He preferred scholarship to politics. That very preference had a political dimension, as well as political implications.

What stands out before the Nazi era is Radbruch's incorporation of politics into the arc of his scholarly career. Despite his intellectual temperament, he did not confine himself to academic pursuits. His passion for social justice drove him also to act politically. He trained as a jurist at the turn of the century, produced two major works of jurisprudence before World War I, expressed his growing social consciousness by joining the Social Democratic Party at war's end, served two stints as Justice Minister between 1921 and 1923, and then returned to what he loved most: a university professorship.[31]

What stands out during the Nazi era is Radbruch's withdrawal from politics for the sake of his scholarly career. When the Nazi regime removed him from the university in May 1933, he took refuge in scholarship. The day after his dismissal he picked up work on his biography of the nineteenth century German jurist Paul Johann Anselm von Feuerbach. He continued to write and publish for the next 12 years.[32] According to the handy but perhaps too facile phrase, he became an "inner emigrant."

The notion of inner emigration is metaphorical. Thus, metaphor might help shed light on the strengths and weaknesses that commonly characterize an inner emigrant. That person is the wrapped gem, whose thoughts retain a glow that outsiders miss. But that person is also the blindfolded hostage, whose thinking may dim from outside constraints. As popular discussion of the famous "Stockholm Syndrome" indicates, a person's

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Gustav Radbruch, 121–31, 129; Radbruch, "Die Erneuerung," 9–10; and Radbruch, "Neue Parteien – Neuer Geist," 337.

31. Gottschalk, "Gustav Radbruchs," 21–22; Paulson, "On the Background," 20–24; Radbruch, "Lebensbeschreibung," in A. Kaufmann, *Gedächtnisschrift*: 23; Theo Rasehorn, *Justizkritik in der Weimarer Republik: Das Beispiel der Zeitschrift 'Die Justiz'* (Frankfurt am Main: Campus, 1985), 47–49; Schneider, "Gustav Radbruch," 295–96, 304; Klaus-Peter Schroeder, *Eine Universität für Juristen und von Juristen: Die Heidelberger Juristische Fakultät im 19. und 20. Jahrhundert* (Tübingen: Mohr Siebeck, 2010), 439–41; Wolf, "Revolution," 12; see also Letter of August 24, 1948, to Walter Spiess, in Radbruch, *Briefe II*: 286–87.

32. Gottschalk, "Gustav Radbruchs," 77; A. Kaufmann, *Gustav Radbruch*, 133; see also Schroeder, *Eine Universität,* 446; and Wolf, "Einleitung," 59.

relationship with an oppressor, or with oppression, can be unexpected and complex. For Radbruch, the inquiry should not be to judge him on a spectrum from courage to cowardice but to look at his method of coping and to relate that coping to the development of his thought. In a later sympathetic portrayal of Franz Schlegelberger (Nazi Germany's acting justice minister in 1941–42), Radbruch described a process that applied to himself: a "gradual spiritual numbing that, through Hitler's wily tactics, infected large parts of the German people."[33] In Radbruch's case, numbing arose from a characteristic love for scholarship, which impaired his ability to critique political developments.

During the Nazi regime, Radbruch—feeling isolated, lonely and adrift—envisioned his continuing intellectual endeavors as at least preserving pure scholarly values. In a letter of January 31, 1938, he confided to the art historian August Grisebach that his immersion in scholarship should not create "the image of an internal idyll," because he "always remains painfully aware that that is all only escape and ersatz, escape from the present, ersatz for the unrecoverable." However, his "devotion to small things and the distant future" filled him with a sense of mission: "to show those who follow us that even in this time there were still men who pursued scholarship for scholarship's sake with a thirst for knowledge."[34] Neither in this nor other letters, however, did Radbruch recognize that he was not only devoting himself to some sort of detached scholarship. He was also clinging to its various trappings: institutional authority, traditional institutions and scholarly traditions—which the Nazi era transformed.

Despite losing his professorship in 1933, Radbruch remained dependent on institutional authority, largely to maintain both his personal economic stability and his academic career. He wanted to keep his pension (which compensated him slightly better than the average active professor at Heidelberg).[35] Still yearning to teach, he sought permission from authorities—ultimately in vain—to take positions abroad, in particular one in Kovno, Lithuania, and another in Zurich, Switzerland. In both instances, he negotiated earnestly, even desperately, and, perhaps, pathetically.[36] In

33. Radbruch, "Des Reichsjustizministeriums Ruhm," 125; see also Letter of January 11, 1948, to Franz und Ulrike Blum, in Radbruch, *Briefe II*: 265; and Letter of January 24, 1948, to Annette Schücking, in ibid., 267.

34. Letter of January 31, 1938, to August and Hanna Grisebach, in Radbruch, *Briefe II*: 145–47; see also Letters of November 29, 1941, to Rudolf Wissell in ibid., 182; of January 3, 1944, to Julius Federer, in ibid., 228; and of March 19, 1944, to Mario Krammer in ibid., 231–32.

35. Gottschalk, "Gustav Radbruchs," 75–77.

36. Ibid., 80–90, 105–8; see also various letters in Radbruch, *Briefe II*: 108, 112–13, 129–33, 136–37; and Schroeder, *Eine Universität*, 446–47.

late November 1933, he begged officials at the Foreign Ministry to empathize: "I have been thrust into an unbearable state of agonizing uncertainty. I ask you to consider that this matter concerns my very life, in particular the one-time possibility of giving meaning again to my life, destroyed by my separation from the teaching profession."[37]

After he lost all hope of landing another position, Radbruch resigned himself to "living in the past with fewer and fewer friends."[38] But he remained dependent on traditional institutions, especially the university, as illustrated by his continued cultivation of scholarly contacts. As early as his dismissal, he had helped choose his own replacement, Karl Engisch (a Nazi Party member). Afterwards Radbruch corresponded with Engisch as well as with Carl August Emge (also a Party member and both vice-president of the Nazi-created German Academy of Law and editor of the journal *Archiv für Rechts- und Sozialphilosophie* [*Archive for Legal and Social Philosophy*]). He was willing to make use of his contacts. In response to Emge's inquiry in November 1940 about Radbruch's publication opportunities within Germany, Radbruch wrote that he would appreciate a review of his book *Elegantiae Juris Criminalis*, published in Basel in 1938.[39]

Radbruch also remained devoted to scholarly traditions. He congratulated contemporaries on their promotions and achievements. In a letter to Reinhard Buchwald in April 1944, for example, he wrote: "The title of professor is today still the most beautiful, still always based on quality. ... You now have a fixed place in the academic hierarchy, which is always an advantage in such a guild-oriented profession."[40] But the failure of others to recognize Radbruch's scholarship was vexing. In June 1942, when a young scholar, Thomas Würtenberger omitted Radbruch's book on

37. Letter of November 27, 1933, to the Foreign Ministry, in Radbruch, *Briefe II*: 108–9.

38. Letter of July 20, 1937, to August Grisebach, in Radbruch, *Briefe II*: 141.

39. Letter of November 3, 1940, to Carl August Emge, in Radbruch, *Briefe II*: 166–67, 450; see also Dennis LeRoy Anderson, *The Academy for German Law, 1933–1944* (New York: Garland, 1987), 123–24, 370, 373–74, 380–81, 386, 389, 391–94, 420, 435–36, 440, 454, 462, 473–75, 481–83, 485–86, 497, 505, 547; Stefan K. Pinter, "Zwischen Anhängerschaft und Kritik: Der Rechtsphilosoph Carl August Emge im Nationalsozialismus," (Diss., Freie Universität Berlin, 1994): 85–87, 90, 104, 110; Steven P. Remy, *The Heidelberg Myth: The Nazification and Denazification of a German University* (Cambridge, MA: Harvard University Press, 2002), 63; Schroeder, *Eine Universität,* 445–46, 537–41; Christian Tilitzki, "Der Rechtsphilosoph Carl August Emge: Vom Schüler Hermann Cohens zum Stellvertreter Hans Frank," *Archiv für Recht und Sozialphilosophie* 89 (2003): 459–96; see generally Carl August Emge, "Bekenntnis zu Gustav Radbruch," in Kaufmann, *Gedächtnisschrift*, 44–49; and Karl Engisch, "Gustav Radbruch als Rechtsphilosoph," in Kaufmann, *Gedächtnisschrift*, 60–68.

40. Letter of April 1944, to Reinhard Buchwald, in Radbruch, *Briefe II*: 234; see also Letter of January 30, 1944, to Eduard Kohlrausch, in ibid., 230.

Feuerbach from an article discussing biographies of famous jurists, Radbruch wrote him an indignant protest: "Perhaps you cannot imagine what it means for a scholar of my age and in my circumstances when a younger researcher ... does not pay attention to and shoves aside his own favorite work. I ... expect your prompt answer."[41]

These dependencies—on institutional authority, traditional institutions, and scholarly traditions—constrained Radbruch's thinking, contributed to a spiritual numbing, and eroded political awareness. Exhausted, resigned, and neutralized, he lost touch with politics in imagining his role in the legal system. He dreamed of opening a legal practice with his son. In a letter in March 1941, Radbruch tried to reassure his son not to be intimidated by his father's superiority "since, just as much as you, I have to work myself into the new law and new spirit."[42]

In adjusting to living under the Nazi regime, Radbruch sank into scholarship as a way to pass the time and contemplate the past rather than to confront the present. He clung to the values of a scholarly guild, to the importance of respect for distinguished colleagues, and to the need for their recognition. In making the small concessions that maintaining this type of scholarship entailed, he avoided thinking about politics—or about subversion or resistance.

III. The "Radbruchian Gap": Radbruch's Accommodation to Unjust Rule

This biographical, historical, and political inquiry illuminates Radbruch's reorientation from positive to natural law. In Radbruch's adjustment to the Nazi regime—pursuing scholarship, deferring to traditional institutions (i.e., the university and state bureaucracy), and shunning politics (reinforced by his self-criticism and growing religiosity)—lurks the little-noticed problem in his postwar vision, as epitomized in his article, "Statutory Injustice and Suprastatutory Law." It suffered not only a historical misinterpretation, but also an accompanying jurisprudential limitation. His postwar jurisprudence implied a theory of coping with, even accommodating, unjust rule.

Radbruch's postwar accommodation to unjust rule becomes clear from a distinction that he drew and a gap that he left. The distinction was between securing justice in establishing Germany's future, on the one hand, and

41. Letter of June 16, 1942, to Thomas Würtenberger, in Radbruch, *Briefe II*: 195; see also Letter of June 21, 1942, to Thomas Würtenberger, in ibid., 197.

42. Letter of March 11, 1941, to Anselm Radbruch, in Radbruch, *Briefe II*: 173; see also Letter of April 3, 1942, to Günter Spendel, in ibid., 193.

ensuring security while also dealing with its Nazi past, on the other. In one passage, Radbruch argued that much National Socialist law attacked the critical demand of justice—that equals be treated equally—and, therefore, lacked the essential character of law itself. Such National Socialist law concerned "not some unjust laws but no law at all."[43] He gave specific examples of such non-law, namely provisions merging the Nazi party with the state, laws that denied human rights by treating some people as subhuman, and penal sanctions that lacked any proportionality, serving solely to instill terror, often with the death penalty, regardless of a crime's severity.[44] By overcoming positivism, Germans could arm themselves against the return of a fundamentally unjust state.[45]

Then Radbruch pivoted. What he had just written about justice "matters for the future." He immediately added: "In response to the statutory injustice of those earlier twelve years, we must try to effectuate the demands of justice with as little sacrifice as possible to legal security."[46] For the sake of preserving legal security in the present and future, he frowned on holding judges accountable: "Not every judge should be allowed to invalidate laws on his own initiative, but rather this task should remain reserved to a higher court or the legislative process."[47]

In drawing this distinction, between the imperative to build future justice and the limits in redressing past injustice, Radbruch left his gap: a neglected "Radbruchian gap" complementing the famous "Radbruchian formula." He provided no answer to the question "What should not only civil servants, such as judges, but also other citizens, let alone victims, have done when living under a tyrannical regime?" His pre-Nazi jurisprudence provided an entrée for addressing this question. Worrying that the conservative, or reactionary, judges in the Weimar Republic were balking at applying recently democratically enacted laws, he insisted that judges must apply the laws, even those that they thought were unjust. But he added that substantive notions of justice must guide legislators and citizens.[48]

43. Radbruch, "Gesetzliches Unrecht," 354; see generally Mertens, "Nazism," 288–89.
44. Radbruch, "Gesetzliches Unrecht," 354; see also Radbruch, "Gesetz und Recht," 99.
45. Radbruch, "Gesetzliches Unrecht," 354–55.
46. Ibid., 355.
47. Ibid.
48. Ulfrid Neumann, "Naturrecht und Positivismus im Denken Gustav Radbruchs: Kontinuitäten und Diskontinuitäten," in *"Vom Rechte, das mit uns geboren ist": Aktuelle Probleme des Naturrechts*, ed. Wilfred Härle und Bernhard Vogel (Freiburg im Breisgau: Herder, 2007): 11–32; Paulson, "Fuller, Radbruch," 345–46; Walther, "Hat der juristische Positivismus," 329; see also Rosenbaum, *Naturrecht und positives Recht*, 91–93; Kurt Sontheimer, *Antidemokratisches Denken in der Weimarer Republik: Die politischen Ideen des deutschen Nationalismus zwischen 1918 und 1933* (Munich: Deutscher Taschenbuch Verlag, 1978), 77.

In his post-Nazi jurisprudence, however, he failed to ask how substantive notions of justice should have guided the conduct of citizens during Nazi rule. He inched no closer to an answer than a lone aside, approving of a law in the American occupation zone that barred punishing perpetrators of political crimes against the Nazi regime.[49] Nor did he provide a satisfactory answer in a questionable passage elsewhere—which he never substantiated, explained, or developed—that the only "spiritual powers" that held their own against and resisted the Nazi regime were the churches.[50] The passage seems to reflect Radbruch's religious turn. Taken as a whole, his approach offered comfort from an "inner emigrant;" no theory for the resister.[51]

The gap in Radbruch's theory, that is, the failure to provide guidance for resisting tyranny, had a troubling implication. Without a theory of resistance, excuses for accomplices to Nazi murder flow more freely. The implication in Radbruch's theory was that postwar Germany should not hold judges accountable for unjust decisions during the Nazi era, such as those that resulted in wrongful executions. As the journalist Jörg Friedrich has suggested, Radbruch's formula invited Nazi era judges to argue that they fell into the elusive category of implementing unjust laws but not intolerably unjust ones.[52] In fact, Radbruch directly formulated two defenses for judges suspected of perverting justice.

First, Radbruch implied that most Nazi era judges must have lacked the necessary criminal intent because of their legal positivism. The implication appeared in his rhetorical question: "But could judges, who were so deformed by the prevailing positivism that they knew nothing besides statutory law, have intentionally broken the law by applying statutory laws?"[53] In another article, Radbruch made the same point even more directly, stating that it is "precisely because of his positivistic legal training that the judge is not to be held personally responsible for the injustice of a sentence based on an unjust statute."[54] This first defense simply repeats Radbruch's underlying error that Nazi era judges were positivists. In a rejoinder to

49. Ibid.; see also Radbruch, "Gesetz und Recht," 97; see generally Mertens, "Nazism," 290.

50. Radbruch, "Neue Parteien – Neuer Geist," 337.

51. See generally Bauer, "Das 'gesetzliche Unrecht' des Nationalsozialismus," in A. Kaufmann, *Gedächtnisschrift*: 304–5.

52. See Jörg Friedrich, *Freispruch für die Nazi-Justiz: Die Urteile gegen NS-Richter seit 1948: Eine Dokumentation* (Reinbek bei Hamburg: Rowohlt, 1983), 56.

53. Radbruch, "Gesetzliches Unrecht," 356.

54. Radbruch, "Die Erneuerung des Rechts," 2, as translated in Paulson, "Fuller, Radbruch," 327; see also Radbruch, "Gesetz und Recht," 98; see generally Friedrich, *Freispruch*, 57–58; Mertens, "Nazism," 291–92; and Letter of April 18, 1948, to Hans Anschütz, in Radbruch, *Briefe II*: 276.

Radbruch, Fritz Bauer—a Jewish Social Democrat and victim of Nazi oppression—essentially said as much (immediately before his own death in 1968): "One is rather inclined to think that precisely judges must have had, and also did have, a consciousness of injustice, especially since during the Weimar Republic they often enough provided proof of twisting unpopular laws into their opposite."[55]

Radbruch's second defense for Nazi era judges who perverted justice was that, even if they had the requisite intent, they could still invoke the defense of necessity. Any other decision would have risked their lives.[56] This second defense rested on a false assumption. Nazi era judges who failed to toe the line might have risked disapproval, foregone career opportunities, and suffered demotions. They might have faced forced retirement and ostracism into the cramped quarters of the inner emigrant. They might have felt anxious. But only two judges during the Nazi era were executed, and then for resistance, not professional conduct.[57] More to the present point is a problem that Radbruch never saw: even if judges rendered decisions in fear for their lives, they would have created no more room for maneuver by invoking natural law.

Thus, Radbruch's reluctance to hold Nazi era judges accountable reflects his failure to provide guidance to resisting tyranny. Perhaps the failure is not surprising. In his own conduct during the Nazi era, he never actively opposed the regime. At most, he published legal views abroad at odds with Nazi legal doctrine,[58] expressed quiet dissatisfaction to friends,[59] and may have slipped into a work an occasional remark that an alert reader could have construed as subversive,[60] or as an expression of frustration. The end result was that Radbruch's approach was out of joint, striving for future justice while restraining attempts to redress past injustice. Although condemning the worst in Nazi era law, Radbruch provided a defense of Nazi era judges rather than a theory of anti-Nazi resistance—or any resistance for that matter.

55. Bauer, "Das 'gesetzliche Unrecht' des Nationalsozialismus," in A. Kaufmann, *Gedächtnisschrift*, 305.

56. Radbruch, "Gesetzliches Unrecht," 356.

57. Müller, *Hitler's Justice,* 192–93.

58. Carl August Emge, "Bekenntnis zu Gustav Radbruch," in A. Kaufmann, *Gedächtnisschrift*, 44–49, 46; Hassemer, "Einführung," 12–13; and Radbruch, "Lebensbeschreibung," in A. Kaufmann, *Gedächtnisschrift*, 24.

59. Helga Einsele, "Erinnerungen an den Lehrer Gustav Radbruch," in A. Kaufmann, *Gedächtnisschrift*, 37–43, 41–42.

60. For example, Scheuren–Brandes, *Der Weg von Nationalsozialistischen Rechtslehren*, 28 fn. 60.

IV. The "Radbruchian Gap": Radbruch's Failure to Provide a Theory for Anti-Nazi Resistance

Radbruch may have left his gap, his failure to grapple with the challenges of an anti-Nazi resistance, because his approach to natural law hardly helped formulate appropriate contemporaneous responses to unjust rule. His postwar vision of the relationship between Nazism and natural law was prescriptive rather than retrospective, offered a solution for future risks rather than past dilemmas, and implied an approach for nipping tyranny in the bud rather than uprooting it when it was already implanted. If Radbruch had expanded his vision to encompass a retrospective proposal for anti-Nazi resistance, if he had argued that Nazi era judges should have used natural law to undermine the regime, the argument would have made little historical sense. Natural law could not have blocked, hindered, confounded, frustrated, or even touched the regime in light of at least three factors: 1) the conformity of German judges, 2) the Nazi era judicial structure, and 3) any realistic political strategy.

First, during the Nazi years, the judiciary as an institution almost immediately displayed its impulse towards conformity. It capitulated to the demands of the new regime, and German judges continued to defer to the regime's general expectations. As a group, German judges had a long tradition of submitting to nondemocratic authority, indeed, of supporting it, a characteristic that Nazi power brokers recognized and exploited. Those power brokers effectively manipulated the judiciary. Authorities in the judiciary not only dismissed judges or forced Jewish members to retire but transferred, demoted, disciplined, suspended, and pushed out judges. The bases for these actions were Nazi party pressure, political reliability, and loyalty to the regime. The problem of German judges was obedience, not to statutory law but to dictatorial rule.[61]

Second, regular judges lost influence as the regime restructured the judiciary. The regime created, controlled, and moved cases, including many political ones, into new tribunals, such as special courts and the People's Courts. Both types of courts encouraged judges to rule harshly by razing traditional procedural norms. The People's Courts included not only lay judges but also many more Nazis than the regular courts.[62]

61. See Lothar Gruchmann, *Justiz im Dritten Reich, 1933–1940: Anpassung und Unterwerfung in der Aera Guertner* (Munich: Oldenbourg, 2001), 124–74, 189–203, 221–40, 270–81, 288–99, 322–24, 931–1112; William Frederick Meinecke, Jr., "Conflicting Loyalties: The Supreme Court in Weimar and Nazi Germany, 1918–1945," (PhD diss., University of Maryland at College Park, 1998), 174–77, 276–78; and Müller, *Hitler's Justice,* 36–41, 129–37.

62. See Ernst Fraenkel, *Der Urdoppelstaat* (1938) (hereafter as *UDS*), in Fraenkel, *Gesammelte Schriften,* 6 vols. (hereafter *GS*), ed. Alexander von Brünneck, Hubertus Buchstein, and Gerhard Göhler (Baden-Baden: Nomos Verlagsgesellschaft, 1999–2011),

Third, as to political strategy, the German judiciary lost any subversive potential once it yielded to Nazi demands within the first 2 months or so of the new regime. Other institutions, such as the army, police, civil service, and provincial governments—which followed their own roads toward accommodation—probably had more effective tools at their disposal. But a lone judge presiding over an individual case could present no systematic challenge to the regime by an isolated, random and ad hoc failure to apply a law because he perceived a gross injustice.

In short, German judges in general would hardly consider invoking humanitarian or moral principles against entrenched authority, Nazi judges in particular would not do so in the tribunals that exerted the most political leverage, and any individual judge wielded little actual power by deciding an individual case based on religious or Enlightenment notions of justice. The Nazi regime had little to fear from judges invoking natural law.

V. The Nazi Euthanasia Program: One Judge's Contemporaneous Protests and its Historical Lessons about the Utility of Natural and Positive Law

Repulsed by Nazi inhumanity, Radbruch roundly condemned Nazi euthanasia and its T4 program for murdering patients.[63] Not surprisingly, scholarship on the theme burgeoned after Radbruch's death in 1949. Scouring the evidence, historians have found a single instance of a judge daring to use his position to subvert Nazi rule. He was Lothar Kreyssig, a bottom-rung judge in Brandenburg, who was responsible for the guardianship of patients in local mental institutions and who in 1940 challenged the T4 program. In previous accounts, historians have mentioned Kreyssig for

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2: 321–22; Gruchmann, *Justiz*, 946–71; Meinecke, "Conflicting Loyalties," 149–52; Müller, *Hitler's Justice*, 51–52, 140–73; Franz Neumann, *Behemoth: The Structure and Practice of National Socialism* (New York: Harper and Row, 1966), 455–56; Rachlin, "Roland Freisler," 71–73; see generally Bernhard Blanke, "Der deutsche Faschismus als Doppelstaat," in *Der Unrechtsstaat, Recht und Justiz im Nationalsozialismus*, ed Redaktion Kritische Justiz (Baden-Baden: Europäische Verlagsanstalt, 1979), 59–81, 71–72; and Ledford, "Judging German Judges," 169.

63. Gustav Radbruch, "Anmerkung," on the Decision of the Oberlandesgericht Frankfurt/Main of August 12, 1947, in Gustav Radbruch, *Gesamtausgabe: Strafrecht II*, Band 8, Arthur Kaufmann, ed. (Heidelberg: C. F. Müller Juristischer Verlag, 1998): 347–51, 347–48; Radbruch, "Die Erneuerung des Rechts," 2; Gustav Radbruch, "Erwiderung," (zu Erwiderung zu Gesetz und Recht) (1947), in Gustav Radbruch, *Gesamtausgabe: Rechtsphilosophie*, Band 3, Arthur Kaufmann, ed. (Heidelberg: C. F. Müller Juristischer Verlag, 1990): 104–6, 105; Radbruch, "Gesetz und Recht," 98; Radbruch, "Privatissimum," 150–53; and Radbruch, "Vorschule," 226.

his rare and courageous anti-Nazi defiance. But his story also casts light on the issue of whether judges could effectively use natural law to challenge the Nazi regime. In tangling with officials, Kreyssig relied on natural law. But he also relied on positive law. What role did each take? While sharing Radbruch's view that the regime's use of euthanasia violated natural law, Kreyssig posed a threat to the implementation of the T4 program only in his use of positive law.

Kreyssig's acts in 1940 make sense only against the general background of the split among German Protestants after the Nazis came to power. As part of the Nazification of religious life, in 1933 an ultranationalistic and racist group known as "German Christians" took control of the Evangelical Church, which included most German Protestants. Rejecting this Nazified Christianity, a group of pastors issued the famous "Barmen Theological Declaration of Faith" in May 1934 and formed the Confessing Church. Led by Pastor Martin Niemöller, the Confessing Church consisted of, in the description of the historian Richard Evans, nationalists whose "religion came first," and whose "piety ... veered increasingly towards biblical fundamentalism." The members, themselves divided between radicals and conservatives, largely focused on maintaining Church independence rather than subverting Nazi rule. The wider split within the Evangelical Church never broke into a full-fledged battle. Many influential Nazi officials recognized the limits in the Church's Nazification, and many members of the Confessing Church avoided anything like resistance in light of both their religious convictions and nationalism.[64]

Kreyssig was a conscientious but unexceptional judge, conservatively and nationalistically disposed, who joined the Confessing Church in 1934. From then on (if not somewhat earlier), he gave allegiance to church over state—actively participating in his church, continuously needling Nazi authorities, and defying pressures to conform. For attacking Nazi church policy, he faced an attempt in 1935–36 to dismiss him, which failed. For joining criticism in 1938 of Nazi measures against Martin Niemöller and other ministers of the Confessing Church, he faced a criminal investigation. For leading a crowd in 1939 that blocked a minister of the Nazi-backed German Christians from conducting religious services and that instead gave the pulpit to the suspended minister of the Confessing Church, he faced another criminal investigation as well as judicial disciplinary proceedings. In 1940, the criminal investigations were dropped (because of

64. Richard J. Evans, *The Third Reich in Power: How the Nazis Won Over the Hearts and Minds of a Nation* (New York: Penguin Press, 2005), 223–30; 225–26 (quotations); see also Matthew D. Hockenos, "The Church Struggle and the Confessional Church: An Introduction to Bonhoeffer's Context," *Studies in Christian–Jewish Relations* 2 (2007): 1–20.

Hitler's general amnesty of September 1939), but the disciplinary proceedings remained pending.[65]

In the early summer of 1940, Kreyssig realized from legal documents crossing his desk (perhaps reinforced by information from the Confessing Church and popular rumors) that authorities were transferring mentally handicapped patients under his ward and murdering them.[66] On July 8, 1940—the very day that one of the criminal investigations against him was dropped—he sent a letter to Justice Minister Franz Gürtner protesting the project based on both its lawlessness and immorality. The chief judge of Berlin's Court of Appeals demanded that Kreyssig withdraw the letter. He refused. He wrote that for 2 months, his wards were being killed "without the guarantee of an orderly judicial proceeding and without a statutory basis." He grounded his objections in the Christian belief in God and also in the program's arbitrariness and injustice. He regretted the lack of procedural protections, such as official notice of the proposed action, an expert justification for it, a right to be heard, a judgement, and an appeal. In language scorning one Nazi buzz word after another, he concluded by rejecting the foundations of Nazi legal thinking:

> Law is whatever serves the people. In the name of this frightful doctrine, still unchallenged by all Germany's guardians of the law, whole areas of community life are exempted from the law, for example, concentration camps completely and now also sanatoriums completely. . . . . Civil law says nothing about whether the guardian judge's approval is necessary if a mentally ill person under his guardianship or trusteeship, and thus under his judicial protection, is supposed to be delivered from life to death without a law and legal decision. Nonetheless I believe that the . . . guardian judge . . . doubtlessly has the judicial duty to intervene for the sake of justice. That is what I want to do. . . . But beforehand it is my duty to seek clarification and advice from my civil superiors. That is what I request.[67]

65. Friedrich Karl Kaul, *Die Psychiatrie im Strudel der "Euthanasie": Ein Bericht über die erste industriemässig durchgeführte Mordaktion des Naziregimes* (Cologne, Frankfurt am Main: Europäische Verlagsanstalt, 1979), 138; Helmut Kramer, "Lothar Kreyssig (1898–1986): Richter und Christ im Widerstand," in Justiz, *Streitbare Juristen*, 342–353, 343–47; and Lothar Gruchmann, "Ein unbequemer Amtsrichter im Dritten Reich: Aus den Personalakten des Dr. Lothar Kreyssig," *Vierteljahrshefte für Zeitgeschichte* 32 (1984): 463–88, 464–70, 483, 485–88.

66. Kaul, *Die Psychiatrie,* 138–39; and Konrad Weiss, *Lothar Kreyssig: Prophet der Versöhnung* (Gerlingen: Bleicher Verlag, 1998), 160–61, 447–48.

67. From the files of the Oberkonsistorial–Präsidenten von Magdeburg, as quoted in Gruchmann, *Justiz*, 505–06; in Gruchmann, "Ein unbequemer Amtsrichter," 470; and in Weiss, *Lothar Kreyssig*, 450–51; see also Gruchmann, "Ein unbequemer Amtsrichter," 486–87; Kaul, *Die Psychiatrie,* 139; and Weiss, *Lothar Kreyssig*, 161–62, 447–51.

Two weeks later, on July 24, 1940, Gürtner attached Kreyssig's protest, among other documents, to a memorandum to Hans Heinrich Lammers, Chief of the Reich Chancellery, as part of a futile effort to convince Hitler to issue a law authorizing and regulating the killings.[68] Within the next several weeks, Roland Freisler, State Secretary in the Justice Ministry, twice called in Kreyssig to show him a draft law and seems to have provided some details about the T4 euthanasia program. Kreyssig did not budge. Instead he took two further steps. First, he requested formally and in person that the prosecutor's office in Potsdam press murder charges against Reichsleiter Philipp Bouhler, Chief of the Führer's Chancellery, who was responsible for the T4 euthanasia program. Contrary to their promise, the prosecutors never got back to Kreyssig. Second, on August 20, 1940, he advised the director and assembled doctors at the sanatorium in Brandenburg-Görden that the killings lacked a legal basis (claiming that they arose from a misunderstanding of a remark by the Führer), and that from now on he would forbid transferring patients under his judicial guardianship to other institutions. He followed up a week later with an order to seven institutions within his jurisdiction to handle patients only "according to existing laws" and not to transfer any without his prior authorization.[69]

On November 13, 1940, Gürtner himself called in Kreyssig. Gürtner first tried to convince Kreyssig to concede that the guardian judge's authorization for transferring patients was not statutorily required. Gürtner then told him that the killings were legal because they were based on Hitler's order, showed Kreyssig a photocopy that the Justice Ministry had recently received of a short enabling letter signed by Hitler on September 1, 1939 (the day that World War II began), and instructed Kreyssig to revoke his order to the institutions. Kreyssig responded that he would need to see the original and, furthermore, that even unobjectionable positivistic legislation could not render injustice just. Gürtner retorted that if Kreyssig could not acknowledge the Führer's will as the source and foundation of law, then he could not remain a judge. He must retire. He did. At the end of November 1940, he wrote to the Ministry requesting retirement because, as a matter of conscience, he could not withdraw his order. The

68. Gruchmann, *Justiz*, 507–8; Weiss, *Lothar Kreyssig*, 167; see also Radbruch, "Des Reichsjustizministeriums Ruhm," 122.

69. Henry Friedlander, *The Origins of Nazi Genocide: From Euthanasia to the Final Solution* (Chapel Hill: University of North Carolina Press, 1995), 121; Gruchmann, "Ein unbequemer Amtsrichter," 470–71, 484; Gruchmann, *Justiz*, 511–12 (quotation); Kaul, *Die Psychiatrie,* 140–42; Kramer, "Lothar Kreyssig," 349–50; and Weiss, *Lothar Kreyssig*, 163–64, 167.

Ministry accepted the retirement, dropped the disciplinary proceedings, and paid his full pension.[70]

The temptation is to present the Kreyssig story as a set piece in moral courage. But that approach risks overlooking its specifically legal significance. To protect patients under his guardianship, that is, to thwart their transfer and execution, Kreyssig made three legal points. First, Kreyssig used a notion of natural law, asserting that no law promulgated by political authorities could violate fundamental principles of justice. Second, he objected to the Nazi legal theory that the fount of all law was Hitler's word. Kreyssig made these first two points boldly, audaciously, and even recklessly. But they made no difference for euthanasia's potential victims.

What made a difference was Kreyssig's third legal point, his reliance on positive law. In fashioning a legal argument, he relied on positive law in denying that the transfer of patients had any basis in existing statutes and in describing the benefits of procedural protections. In justifying legal action, he relied on positive law by invoking the authority of his position as judicial guardian of his wards and by issuing orders on the authority of his office to prohibit transfers. Freisler and Gürtner—who exploited Kreyssig's protest in their own efforts to press the Reich Chancellery for a law regulating the T4 euthanasia program[71]—recognized that the danger that Kreyssig posed lay in his argument based on positive law. They met him on that plain. Freisler tested whether a draft law would meet Kreyssig's concern about a breach in the law. Gürtner tried to convince him to concede that the law did not require a guardian judge to authorize the transfer of patients (probably reflecting a worry that other judges might adopt Kreyssig's legal interpretation, even though, so far, Kreyssig was the only one of approximately 1,400 guardian judges who had done so[72]). Gürtner also presented him with Hitler's letter to show written authorization for the T4 euthanasia program. When Kreyssig demurred as a matter of positive law, denied Nazi legal theory, and invoked natural law, Gürtner ended the discussion and asserted his superior power. With that, Kreyssig lost any potential power he might have had to help euthanasia victims.

In mining Nazi history for tales of inspiration, Kreyssig serves well. To save the lives of his wards, he acted with unshakeable religious faith, unquestionable courage, and stubborn resolve. The trip wire was his unshakeable religious faith. That faith is essential for understanding Kreyssig the

70. Gruchmann, "Ein unbequemer Amtsrichter," 471–73 484; Gruchmann, *Justiz*, 512; Kaul, *Die Psychiatrie,* 142–43; Kramer, "Lothar Kreyssig," 350–51; and Weiss, *Lothar Kreyssig*, 170–76, 179 fn. 23.

71. Kramer, "Lothar Kreyssig," 351–52; and Weiss, *Lothar Kreyssig*, 167.

72. See Kaul, *Die Psychiatrie,* 139; and Weiss, *Lothar Kreyssig*, 162.

man. He needed to express religious beliefs, act by his standards of morality, and try to save lives, and he probably conceived of these efforts as an inseparable whole. But self-expression is not necessarily effective politics. If measured by the goal of saving the lives of his wards, Kreyssig made a strategic mistake. He debated Nazi legal theory with jurists supporting the regime and told them that natural law must prevail. Doing so expressed his sincere beliefs, but interfered with achieving his goal to save lives. In his need to not only act on his religious beliefs but to also proclaim them, as illustrated in his professional and legal skirmishes from 1933 through 1940, he taunted authorities—inviting his own dismissal, arrest, and internment.[73] He took a similar approach in challenging the T4 euthanasia program. He could have incurred less personal risk and obstructed the local T4 program longer (even if only slightly longer) by confining his arguments to statutory law.

In short, Kreyssig's power resided in his position as a judge, which he could exploit to save some lives and ruffle Nazi policy. He probably exercised his power effectively through the incidents of the office, navigation of the judicial hierarchy, and statutory argument, but he made the strategic mistake of overreaching. When he realized that Gürtner had backed him into a corner, Kreyssig retired in good conscience—but at that moment, it was a conscience that had lost any judicial leverage over official acts or policy. The lesson for the history of jurisprudence is that the sword that a judge could wield against state crime, and which the state had to parry, was positive law.[74] The lesson eluded Gustav Radbruch.

VI. The Nazi Euthanasia Program: Radbruch's Historical Misinterpretation

Why did the lesson elude Radbruch? The beginning of an answer—but only the beginning of one—emerges from his knowledge about the Nazi T4 euthanasia program. He thought that he knew enough to develop three themes on the matter: a moral condemnation, a historical conclusion, and a jurisprudential generalization about natural and positive law. Although his moral condemnation is straightforward, he drew a historical conclusion from insufficient information. In fact, he got the history wrong. Details uncovered in later scholarship show the opposite of what

73. See Gruchmann, "Ein unbequemer Amtsrichter," 474–75, 486–87; and Kramer, "Lothar Kreyssig," 351.

74. See generally Rosenbaum, *Naturrecht und positives Recht* 147; and Detlev F. Vagts, "International Law in the Third Reich," *The American Journal of International Law* 84 (1990): 661–704, 671.

he asserted. Whatever other grounds Radbruch had for his jurisprudential generalization, it cannot rest on his historical account of the T4 program.

In September 1947, Radbruch opened a newspaper article, "Admonition on the Administration of Justice," with dramatic flare: "Juridical positivism sits in the dock. It is the contribution of German jurisprudence to the collective guilt of the German people." Radbruch argued that positivism was impotent to counter unjust decrees, such as Hitler's enabling letter of September 1, 1939, authorizing the T4 program. The protests of positivists, according to Radbruch, were fruitless, as exemplified by Justice Minister Gürtner's letter of July 24, 1940, to Chief of the Reich Chancellery Lammers, protesting the secret killing of mentally ill people without a law, and further exemplified by a letter in March 1941 by Gürtner's successor, Franz Schlegelberger, expressing concern about the difficulties and embarrassments caused by relying on a secret decree.[75] In another piece 2 months later (a comment on a postwar judicial decision from December 1947), Radbruch continued to portray Gürtner and Schlegelberger sympathetically but made somewhat of an about-face, crediting their respective letters with successfully pressuring Hitler to order an end to euthanasia in August 1942.[76]

Radbruch inferred too much from too little, offering history upside down. Both Gürtner and Schlegelberger facilitated Nazi euthanasia. As the historians Henry Friedlander and Eli Nathans have shown, Gürtner knew of euthanasia for months before writing his letter of July 24, 1940, and, once receiving a copy of Hitler's enabling letter on August 27, 1940, insisted that all officials, such as Judge Kreyssig, comply. Schlegelberger, on taking over in late January 1941, redoubled efforts to protect the T4 program. In his letter in March 1941, he complained about problems with the program's secrecy, not with the program itself. Then he called a conference for late April of top judges and prosecutors to warn against heeding legal objections to euthanasia and against contravening the Führer's will. Finally, the letters from Gürtner and Schlegelberger had nothing to do with Hitler's order in August 1942, which was limited to suspending gassings in domestic hospitals. Euthanasia continued by other means, with more people murdered under its rubric after the order than before.[77] Thus, far from using law to stop

75. Radbruch, "Privatissimum," 151–52.

76. Radbruch, "Anmerkung," 347.

77. Friedlander, *Origins of Nazi Genocide*, 61, 85, 110–12, 116–23, 136, 148–49, 151; Eli Nathans, "Legal Order as Motive and Mask: Franz Schlegelberger and the Nazi Administration of Justice," in *Law and History Review* 18 (2000): 1–38, 22–24; Eli Nathans, *Franz Schlegelberger* (Baden-Baden: Nomos, 1990): 58–59; see also Müller, *Hitler's Justice*, 127–28.

euthanasia, both Gürtner and Schlegelberger promoted it, in part on the theory, which Schlegelberger continued to propound after the war, that Hitler's secret enabling letter had the force of law.[78]

Radbruch was a legal philosopher, not a historian. He used his historical account of Nazi euthanasia to illustrate, not to generate, his jurisprudence about positive law and natural law. Still, there are hints that Radbruch skewed the historical details that he did know to fit his jurisprudence. For example, Radbruch suggested that Gürtner denied the legal authority of Hitler's enabling letter, even though Radbruch knew that Gürtner wrote his letter of July 24, 1940, protesting the secret killing of mentally ill people a month before learning of Hitler's secret enabling letter. For another example, Radbruch suggested that Schlegelberger's letter in March 1941 questioned the euthanasia program in principle, while it really only complained about practical difficulties caused by its secrecy. Would Radbruch have changed his mind if only he had known more historical facts?

VII. The Vices in Positive Law: Radbruch's Misconstrual of Positive Law in a Late Essay on a Nazi Perpetrator

The answer to the question of whether Radbruch would have changed his mind if he had known more historical facts is, probably, no. A fuller understanding of why Radbruch misinterpreted the interactions between natural and positive law under the Nazi regime emerges from analyzing another piece, one of his last, the 1948 essay, "The Glory and the End of the Reich Ministry of Justice: On the Nuremberg Judges' Trial."[79] This essay provides a nice balance to the earlier and more famous "Statutory Injustice and Suprastatutory Law." For illuminating the problems with Radbruch's postwar thinking, this late essay gets closer to issues raised by the Radbruchian gap by focusing on actions during the Nazi era itself, and exposes weaknesses in Radbruch's thinking about positive law.

Occasioned by the verdict in the war crimes trial in 1947 of sixteen jurists and lawyers—one of the twelve American military trials held in Nuremberg after the famous international Nuremberg trial—in this essay Radbruch addressed three themes. They concerned an idea, an institution, and a person. The idea was the nature of law, the institution was the German Reich Justice Ministry, and the person was Franz Schlegelberger, the Acting Justice Minister for 1 ½ years in 1941–42

78. Nathans, *Schlegelberger*, 59 fn. 238.

79. Radbruch, "Des Reichsjustizministeriums Ruhm."

(and an acquaintance of Radbruch's).[80] Despite the grace of his exposition, Radbruch did not so much weave the themes together as get them tangled up. In drawing his conclusions, he misinterpreted historical evidence, retreated to religious faith, and missed the significance of politics, all the while misconstruing the possibilities of positive law.

In his essay, Radbruch placed his three themes into a grand narrative. In the opening paragraph, he idealized, and virtually idolized, the Justice Ministry—an institution over which he had once presided and that he greatly admired. It embodied, in Radbruch's eyes, a sublime legal tradition of technical expertise and detached impartiality.[81] Throughout the Weimar Republic, Curt Joël, first as the Ministry's highest ranking civil servant and then as justice minister himself, almost perfectly personified the institution and its values.[82] From 1933 through 1941, Franz Gürtner maintained much of the Ministry's character based on his own experience, legal abilities, and legal sensibilities, even if he did not fight for justice with all his energy, and at times accommodated the Nazi regime.[83] Schlegelberger filled an 18 month gap as acting justice minister from late January 1941 to August 1942.[84] Under his successor, Otto Georg Thierack, justice collapsed as the Ministry sacrificed its independence, ceded critical responsibilities to the police, and indulged the wishes of the SS leader Heinrich Himmler.[85] With Germany's defeat, the Justice Ministry itself perished, sullied with dishonor.[86] In conclusion, Radbruch quoted a remark from the decision in the Judges' Trial about those few German judges "who still upheld the ideals of judicial independence and who handed down justice with a certain impartiality and moderation."[87] Thus, with an almost religious sweep, Radbruch described the Justice Ministry's halcyon days, decline, and downfall, and then concluded on a redemptive note of hope.

Schlegelberger occupied the heart of Radbruch's essay.[88] As Gürtner had died in 1941 and Thierack committed suicide in 1946, the highest ranking defendant at the Judges' Trial was Schlegelberger. The court

80. See Letter of January 11, 1948, to Franz und Ulrike Blum, in Radbruch, *Briefe II*: 265.

81. Radbruch, "Des Reichsjustizministeriums Ruhm," 121.

82. Ibid., 121–22; see generally Peter Dieners, "Curt Joël (1865–1945): Administrator der Reichsjustiz," in Heinrichs, Franzki, Schmalz, and Stolleis, *Deutsche Juristen jüdischer Herkunft,* 485–94; and Klaus-Detlev Godau-Schüttke, "Curt Joël – 'Graue Eminenz' und Zentralfigur der Weimarer Justiz," *Kritische Justiz* 25 (1992): 82–93.

83. Radbruch, "Des Reichsjustizministeriums Ruhm," 122; see generally Gruchmann, *Justiz*.

84. Radbruch, "Des Reichsjustizministeriums Ruhm," 123.

85. Ibid., 130.

86. Ibid.

87. Ibid., 131.

88. Ibid., 122–30; see generally Nathans, *Schlegelberger*, 8–9.

delivered a guilty verdict, which Radbruch, as he expressed in both this essay and private correspondence, thought just.[89] But while venerating Joël and loathing Thierack, Radbruch found Schlegelberger a source of anguish. He represented the last gasp of a once proud legal tradition and, as the American court put it, cut a "tragic figure."[90] The tragedy, in Radbruch's view, lay in Schlegelberger joining in evil without curtailing it.[91] Lined up against an array of bureaucratic opponents, most formidably Himmler himself,[92] Schlegelberger struggled to preserve legal process against arbitrary police action, at least on occasion, but in making ever larger compromises, he ultimately succumbed to evil.[93] Sacrificing his convictions, conscience, and dignity in vain, Schlegelberger failed to slow the juggernaut of the police state.[94]

With a tragic vision of Schlegelberger's personal flaws and the Reich Justice Ministry's institutional weaknesses, Radbruch concluded that law itself suffered shortcomings. Only religion, or natural law, could compensate. Adopting an intimate voice in direct address to the reader, Radbruch offered three lessons from Schlegelberger's case. The first two seem almost commonplace. Do not believe that anybody can participate in evil to prevent even worse, and do not believe that people may ignore their individual consciences for the sake of higher goals. The third lesson is similar to what Radbruch had written in the preceding postwar years about natural law. Do not believe that anybody "can answer the ultimate questions of justice and master the hardest problems of justice with values like objectivity and lawfulness." The idea of justice should not shrivel into "the cultivation of secondary values, like lawfulness and objectivity, an expression of positivism, which has forgotten the highest of all dictates of justice: to obey God rather than man."[95]

The problem with the reasoning in Radbruch's essay is that he elevated natural law by misconstruing positive law, that he misconstrued positive law by misunderstanding Schlegelberger's use of law, that he misunderstood Schlegelberger's use of law from a sense of pity, that he felt a

89. Radbruch, "Des Reichsjustizministeriums Ruhm," 128–29; Letter of January 11, 1948, to Franz und Ulrike Blum, in Radbruch, *Briefe II*: 264–65; see generally Robert M. W. Kempner, *Ankläger einer Epoche: Lebenserinnerungen* (Frankfurt am Main: Ullstein, 1983), 287–88; Müller, *Hitler's Justice,* 270–73; and Nathans, *Schlegelberger*, 7, 77.

90. Radbruch, "Des Reichsjustizministeriums Ruhm," 124.

91. Ibid., 128–29; see also Nathans, *Schlegelberger*, 7–10, 80; and Nathans, "Legal Order," 28.

92. Radbruch "Des Reichsjustizministeriums Ruhm," 123–24.

93. Ibid., 124–25; see also Letter of January 11, 1948, to Franz und Ulrike Blum, in Radbruch, *Briefe II*: 265.

94. Radbruch, "Des Reichsjustizministeriums Ruhm," 128–29.

95. Ibid., 129.

sense of pity from a misplaced tragic vision, and that his misplaced tragic vision displaced historical inquiry. Aristotle contrasted tragedy with history, prioritizing tragedy, for its universal lessons, to history, with its narrow focus on particular events. With like disposition, Radbruch sought a moral lesson before probing the past. Succumbing to feelings of pity, Radbruch wrote: "We must believe [Schlegelberger] in what he repeatedly emphasized: that he remained only to protect against worse, to block more dangerous successors, not to leave like-minded colleagues in the lurch, and not to deprive judges of their last support in his person."[96]

Why must we believe Schlegelberger? Seeing Schlegelberger as a tragic figure overcome by circumstances, Radbruch lost sight of alternative historical explanations for Schlegelberger's conduct. The tension between Radbruch's expansive tragic vision and narrow historical imagination is clear from an oddity in his essay. His interjections about Schlegelberger's good will jar with his accounts of Schlegelberger's harmful actions. Radbruch's essay tells two contradictory tales, one of Schlegelberger's misconduct, the other of his good intent. Radbruch seemed unable to reconcile what Schlegelberger did with how any decent jurist should have reasoned. In part, Radbruch saw a losing battle in defense of law because he could not explain why legal institutions, such as the Justice Ministry, and jurists, such as Schlegelberger, would use law to promote Nazi crimes rather than resist them.

But recent historians have offered just such an explanation. In a nutshell, Nazi leaders needed legal experts, including in the Justice Ministry, to establish a legal framework for developing a state based on race, for excluding outsiders from the new Aryan community, and for implementing Nazi policies. The legal experts, in turn, adapted to their new role, advancing a vision not of law but of Nazism through law, reconstituting law in the image of Nazi ideology. They advanced Nazi policies bureaucratically rather than violently, with regulations, decrees, and commands and, in so doing, imbued Nazi policies with legitimacy. Like others in the Nazi state, they also protected their own turf and jockeyed for power. Only in developing postwar litigation strategies to defend against criminal charges and to procure pension benefits did they invent the claim that they were secret opponents trying to stave off the worst of Nazi evils.[97]

96. Ibid., 124.

97. See generally Hans-Christian Jasch, "Civil Service Lawyers and the Holocaust: The Case of Wilhelm Stuckart," in Steinweis and Rachlin, *The Law in Nazi Germany*, 37–61; Claudia Koonz, *The Nazi Conscience* (Cambridge, MA: Belknap Press, 2003), 163–89; Helmut Kramer, "Das Nürnberger Juristenurteil (Fall 3) – Eine Lektion für die Justiz der BRD?" in *Politik als Verbrechen: 40 Jahre "Nürnberger Prozesse"* ed. Martin Hirsch,

In his essay, Radbruch missed the possibilities of using positive law to resist tyranny because he drew skewed lessons from Schlegelberger's career and the Justice Ministry's traditions. According to Radbruch's reading, Schlegelberger failed to restrain Nazi atrocities despite his struggle for the Justice Ministry's ideals of lawfulness, objectivity, and detached neutrality. Furthermore, his failure illustrated the flaw in Radbruch's own prior ideals, which relied too heavily on positive law. But in oversentimentalizing the Justice Ministry's former virtues and in empathizing with Schlegelberger the bureaucrat, Radbruch misidentified Schlegelberger's failures. They hardly arose from a stubborn adherence to positive law. Rather, like German judges and other civil servants in general, Schlegelberger subordinated positivism to authoritarian beliefs and Nazi loyalty. Although Radbruch mentioned in passing the politicization of the Justice Ministry,[98] he failed to develop the theme. Yet Schlegelberger used law politically, tendentiously, and instrumentally to promote the regime's brutally discriminatory policies, including the T4 euthanasia program of murdering the disabled.[99] Once in a while Schlegelberger tried to shift some power—a sliver here, a sliver there—from SS thugs toward elite jurists. Schlegelberger staked his postwar defense and his self-esteem on these episodes, but ultimately they involved empowering jurists rather than upholding law. At best, they were side shows. Occasionally skirmishing with people such as Himmler, Schlegelberger always deferred to Hitler—immediately, unabashedly, and obsequiously. Schlegelberger's authoritarianism and loyalty invariably prevailed.[100]

Schlegelberger's loyalty to the Nazi regime, not his positivistic adherence to law, appears in five historical examples that Radbruch discusses in his essay. These examples, Radbruch asserted, showed that Schlegelberger had made unfortunate legal compromises in his persistent efforts to forestall Himmler's encroachments on the judicial system.[101] In fact, turf battles aside, they show Schlegelberger's complicity in overall Nazi policies.

The pattern in Radbruch's first and last examples is the same. A court sentenced a defendant to prison, Hitler demanded executions, and Schlegelberger did the necessary. In the first example, an old Jewish

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Norman Paech, and Gerhard Stuby (Hamburg: VSA Verlag, 1986), 60–63, 61; Nathans, "Legal Order," 17; and Walther, "Hat der juristische Positivismus," 352.

98. Radbruch, "Des Reichsjustizministeriums Ruhm," 122.

99. See Friedlander, *Origins of Nazi Genocide*, 122–23; Müller, *Hitler's Justice,* 127–28; Nathans, "Legal Order," 22–24; Nathans, *Schlegelberger*, 57–59, 84.

100. *See* Nathans, "Legal Order," 19–26, 33–35, 37; Nathans, *Schlegelberger*, 41, 55–59, 83–84.

101. Radbruch, "Des Reichsjustizministeriums Ruhm," 125.

man, Markus Luftglass—Nazi correspondence and Radbruch's essay chillingly misspell his name as "Luft*gas*"—was sentenced to 2 ½ years for hoarding eggs, an irritated Hitler asked for the death sentence, and within 5 days Schlegelberger responded that he had handed Luftglass over "to the Gestapo for execution." In his concluding sentence on this example, Radbruch volunteered that "it could no longer be determined whether and what steps were undertaken [in those 5 days] to save Luftgas [sic]."[102] Thus, while all the available evidence showed that Schlegelberger hastened Luftglass's execution, Radbruch implied the opposite. By substituting a grammatical construction for evidence, Radbruch suggested that maybe and perhaps Schlegelberger tried to save Luftglass and that maybe and perhaps grounds existed for exonerating Schlegelberger.

In the other example, Hitler phoned to protest the 10 year sentence of a man named Ewald Schlitt, Schlegelberger arranged for an emergency appeal, and he then reported back that Schlitt had been sentenced to death and immediately executed. "Out of utter conviction, my leader," Schlegelberger wrote Hitler, "I share your desire for the hardest punishment of criminality." Schlegelberger assured Hitler that he was indoctrinating judges to impose harsher sentences and that he would not shrink from personnel measures to reduce even further the number of objectionably low sentences. Radbruch, although confounded by such obeisance, still insisted that Schlegelberger's basic disposition was "indisputably" otherwise in light of so much testimony that he "intervened without prejudice and not without courage for victims of racial and political persecution."[103] In

102. Ibid., 126; see also Diemut Majer, *"Non-Germans" under the Third Reich: The Nazi Judicial and Administrative System in Germany and Occupied Eastern Europe, with Special Regard to Occupied Poland, 1939–1945* (Baltimore, London: Johns Hopkins University Press, 2003), 848 fn. 99; Harry Reicher, "Evading Responsibility for Crimes against Humanity: Murderous Lawyers at Nuremberg," in Steinweis and Rachlin, *The Law in Nazi Germany*, 137–159, 140–41, 145–46, 155 fn. 16, 208–10; and Nathans, *Schlegelberger*, 57. With characteristic German thoroughness, the editors of Radbruch's Collected Works have adorned their reprinting of "The Glory and the End of the Reich Ministry of Justice" with annotations on the several Nazi officials mentioned in the essay. As to Mr. Luftglass, including the correct spelling of his name, they write nothing. See Gustav Radbruch, "Des Reichsjustizministeriums Ruhm und Ende: Zum Nürnberger Juristenprozess," (1948), in Radbruch, *Gesamtausgabe: Strafrecht II*, 258–68; 423–26, especially 263.

103. Radbruch, "Des Reichsjustizministeriums Ruhm," 128; see also Werner Johe, *Die gleichgeschaltete Justiz: Organisation des Rechtswesens und Politisierung der Rechtssprechung, 1933–1945, dargestellt am Beispiel des Oberlandesgerichtsbezirks Hamburg* (Hamburg: Christians, 1983), 172–74. The editors of Radbruch's Collected Works, in keeping with their approach to Mr. Luftglass, provide no information on Mr. Schlitt either, not even his first name. See Radbruch, "Des Reichsjustizministeriums Ruhm und Ende," in Radbruch, *Gesamtausgabe: Strafrecht II*, 263; 423–26.

fact, while Schlegelberger always complied with Hitler's demands, and repeatedly ordered judges to sentence more harshly and impose more death sentences,[104] he only rarely favored victims of Nazi oppression.[105] On behalf of his former Jewish superior Curt Joël, for example, Schlegelberger helped a bit—before dropping the matter.[106] If Schlegelberger ever cared about victims, he did so at no risk to himself and with no challenge to Nazism's ultimate goals.[107]

In addition to facilitating individual executions, Schlegelberger helped draft repressive laws. Radbruch gave two historical examples. In December 1941, the Criminal Law Decree for Poles and Jews in incorporated territories was issued, which Schlegelberger had helped frame. "The draft," wrote Schlegelberger, "sets up a draconian special criminal law for Jews and Poles, which expansively formulates the elements of offenses and everywhere allows the death penalty."[108] Radbruch claimed that Schlegelberger's explanations concealed his inclusion of legal protections and lighter punishments, most importantly, in placing jurisdiction in the regular courts rather than with the police, and in rejecting corporal punishment. Radbruch understood, however, that the numbers of convictions in 1942 alone presented "a terrifying picture."[109] Similarly, but still worse, in November 1941, Schlegelberger helped draft the "Night and Fog" decree, which ordered that resisters in occupied territories face one of two outcomes: either conviction in the area's military courts, which would probably impose a death sentence, or transport back to Germany for proceedings before wartime courts, which would assure their "disappearance." According to Radbruch, Schlegelberger believed that he was offering "the unhappy victims of this 'Night and Fog' decree legal process" through special courts. Radbruch understood, however, that such courts were weak and ineffective, for they operated in secret and ultimately only long prison sentences could spare the accused from concentration camps.[110]

A minimal, and sufficient, interpretation of the historical evidence is that Schlegelberger, in negotiating these two oppressive laws, aimed to keep

104. Majer, *"Non-Germans,"* 337, 360, 362–63, 830 fn. 73, 75; 833, fn. 104; 849–50 fn. 115, 116, 120, 125; Nathans, "Legal Order," 20–21, 25; and Nathans, *Schlegelberger*, 57, 62, 66, 69–73.

105. For example, Majer, *"Non-Germans,"* 826–27 fn. 31.

106. Nathans, *Schlegelberger*, 42–43.

107. See for example, Nathans, *Schlegelberger*, 45.

108. Radbruch, "Des Reichsjustizministeriums Ruhm," 126.

109. Ibid.; see also Majer, *"Non-Germans,"* 876 fn. 71; and Nathans, *Schlegelberger*, 61–62, 65–68.

110. Radbruch, "Des Reichsjustizministeriums Ruhm," 126–27; see also Nathans, *Schlegelberger*, 70.

the criminal courts in business, that is, to retain some jurisdiction, rather than to cede everything to Himmler's mushrooming police.[111] But Radbruch detected something more. Although recognizing fundamental and irreparable failings in both laws, he problematically suggested that Schlegelberger tried to preserve judicial prerogatives in part to protect arrestees. That is to say, Schlegelberger had hoped that reserving some power to the courts may have trickled down to the benefit of Poles, Jews, and resisters. Radbruch provided no evidence that Schlegelberger actually harbored such hopes or that courts were inclined to grant arrestees any benefits. In fact, arrestees could only despair before judges who had long been bowing deeply to the Nazi state and were obeying directives, including from superiors such as Schlegelberger, for severity.[112]

Nor could arrestees find comfort in the two laws themselves. Their critical provisions would have disgusted any self-respecting positivist. Contrary to positivism's essential tenets, both laws (to name some but not all their egregious provisions) applied retroactively; defined crimes expansively, vaguely, and virtually without limit; and encouraged death sentences as the standard, however disproportionate to the underlying offenses.[113] If, compared with Himmler, Schlegelberger wanted procedures, the reason is that courts need them to function, not that arrestees could wrap themselves in such procedures for cover. Furthermore, Himmler's lawlessness provides no measure for adherence to legal standards. In helping draft these laws, Schlegelberger acted as a positivist only in the sense that he helped create rules (and not just followed them). But these laws were rules only in the sense that they used rule-like language that opened another route to arbitrary state murder. If Schlegelberger ever cared about victims of Nazi oppression, here he was thinking of other things.

A fifth historical example disturbed Radbruch the most, namely Schlegelberger's recommendation that authorities not deport half-Jews to the East if they submitted to sterilization.[114] Radbruch's description included a telling sentence: "Schlegelberger correctly explained that one could not have won over the power brokers with arguments of humanity but had to descend to their level to be able to effectively argue against

111. See generally Lothar Gruchmann, "'Nacht- und Nebel' - Justiz: Die Mitwirkung deutscher Strafgerichte an der Bekämpfung des Widerstandes in den besetzten Westeuropäischen Ländern, 1942–1944," in *Vierteljahrshefte für Zeitgeschichte* 29 (1981): 342–96, 343–44, 348–49; and Majer, *"Non-Germans,"* 419–21, 876 fn. 70.

112. For example, ibid., 419–21, 876 fn. 70.

113. See Gruchmann, "Nacht und Nebel," 345–47, 354, 364; and Majer, *"Non-Germans,"* 368–69, 418–26, 853 fn. 16.

114. Radbruch, "Des Reichsjustizministeriums Ruhm," 127; see also Kempner, *Ankläger einer Epoche*, 286; and Nathans, *Schlegelberger*, 70–71.

them."[115] Although Radbruch then dismissed Schlegelberger's compromise because it preserved little humanity at all, the sentence is worth parsing. Radbruch missed a problem with the dichotomy that Schlegelberger had drawn. The problem was not in the first clause, that is, that Nazi "power brokers" would not respond to "arguments of humanity," which is similar to the point we have made. Rather, the problem was in the second clause, that is, that the alternative was "to descend to their level." Locking horns with Nazi inhumanity did not necessarily require fighting back like another moose. Rather, the possibility existed of trying to answer with arguments that included a measure of neutrality based on positive law. That was part of the approach that Judge Kreyssig used in trying to protect his wards. That was the ideal that Radbruch himself imagined from the earlier days of the Justice Ministry. Radbruch returned to that notion toward the end of his essay. He quoted, as mentioned earlier, a reference in the Judges' Trial decision—which was overly generous and not backed up by examples but which Radbruch doubtless believed—that there had been some German judges "who still upheld the ideals of judicial independence and who handed down justice with a certain impartiality and moderation."[116]

In short, Radbruch largely based his criticism of positive law on historical distortions. His jurisprudential conclusions about the relationship between natural and positive law drove his historical descriptions, not vice versa.

VIII. A Truncated Positive Law: More on Radbruch Misconstruing Positive Law in his Late Essay on a Nazi Perpetrator

In discussing the five historical examples, Radbruch neglected a possibility that he had touched upon in his earlier essay, "Statutory Injustice and Suprastatutory Law," and that characterizes much positive law and impartial decision making. He neglected the notion of equality before the law. This notion is integral to not only the Anglo-American ideal of the rule of law but also its German variant, the *Rechtsstaat* doctrine (more literally translated as the "state under law" or the "just state").[117] As the historian Eli Nathans has noted, before 1945, Schlegelberger rarely, if ever, pleaded

115. Radbruch, "Des Reichsjustizministeriums Ruhm," 127.

116. Ibid., 131.

117. See Ernst-Wolfgang Böckenförde, "The Origin and Development of the Concept of the *Rechtsstaat*," in *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (New York/Oxford: Berg, 1991), 47–71, 50, 53–54, 60–61; and Franz Neumann, "The Concept of Political Freedom," *Columbia Law Review* 53 (1953): 901–35, 908–12.

for upholding the *Rechtsstaat*.[118] But he typified legally trained civil servants who imagined themselves devotees of at least the authoritarian version of the *Rechtsstaat*. Such civil servants prided themselves on effectuating laws on behalf of the state and on doing so independently, regardless of politics.[119] The *Rechtsstaat* doctrine, however, also included a commitment to neutral laws and fair bureaucracies that treated citizens equally. With the Nazi regime, the authoritarian impulse behind the *Rechtsstaat* doctrine persisted while the notion of equal treatment by fair bureaucracies under neutral laws fell by the wayside. Schlegelberger energetically advanced laws and policies that discriminated against, dehumanized, and helped annihilate Poles and Jews.[120]

The surprise is not that someone with authoritarian inclinations such as Schlegelberger acquiesced, even welcomed this development—the collapse of equal treatment under law[121]—but rather that a Social Democrat such as Radbruch ignored that collapse while evaluating Schlegelberger. Radbruch argued that Schlegelberger at least tried to preserve legal independence.[122] The argument is disquieting, because Schlegelberger's notion of judicial independence was to protect judges' professional security while ensuring their submission to Nazi demands.[123] Radbruch, however, disregarded that Schlegelberger used the legal system for discrimination, and murderous discrimination at that, against Jews, against Poles, and against dissenters of any kind. Yet that perversion of law lay at the heart of the Nuremberg Judges' Trial's judgement, which wrote that Schlegelberger "employed the Ministry of Justice as a means for exterminating the Jewish and Polish populations, terrorizing the inhabitants of occupied countries, and wiping out political opposition at home."[124] What Schlegelberger personified was not the dangers inherent in the detached legal professional, what the work of the Justice Ministry incarnated was not the defects in objective neutral law, and what fell short as a legal doctrine was not positivism. What the man, the institution, and the role of legal doctrine illustrated was the inhumanity in discriminatory, and racist, law.

118. Nathans, "Legal Order," 8, 8 fn. 20, 36.

119. See Mathias Reimann, "Book Review of Eli Nathans, *Franz Schlegelberger*," *The American Journal of Comparative Law* 39 (1991): 459–62, 460, 462.

120. See Majer, *"Non-Germans,"* 336–37; 340–41, 419–23, 830 fn. 73, 75; 833 fn. 104.

121. See Nathans, "Legal Order," 6–18, 33.

122. Radbruch, "Des Reichsjustizministeriums Ruhm," 129–30.

123. Majer, *"Non-Germans,"* 340–41, 833 fns, 102–4; Nathans, *Schlegelberger*, 72–73, 79; and Nathans, "Legal Order," 17–19.

124. *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10, Nuernberg, October 1946 – April 1949*, 15 vols. (Washington: U.S. Government Printing Office, 1949–53), Vol. III, *Case 3,* U.S. v. Alstoetter, et al. *("The Justice Case")* (Washington, 1951), 1086.

They epitomized the perils in sacrificing liberal legal standards to a fanatically right-wing politics.

Both Schlegelberger's actions and his contempt for legal equality belie his self-defense: that, with good intentions, he honorably, even if futilely, tried using law to fend off the truculent SS state. The question is why Radbruch expressed such sympathy. Why did Radbruch so vigorously seek good will in a man who furthered discrimination, state-sponsored crime, and brutality? The answers both track the three themes in his essay on the Judges' Trial and recapitulate reasons for the defects in Radbruch's earlier, more famous essay, "Statutory Injustice and Suprastatutory Law."

First, just as Radbruch misinterpreted Nazi legal history in a process of self-criticism,[125] he overidentified with Schlegelberger. The decision in the Judges' Trial described Schlegelberger as "a tragic character" because "[h]e loved the life of an intellect, the work of the scholar ... but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security."[126] That passage must have stung Radbruch. It must have aroused in him pity, springing from the dreadful vision that he could have easily suffered a similar fate. Radbruch had much in common with Schlegelberger. Two decades earlier, Radbruch, too, had served as justice minister; he also pursued the "life of an intellect [and] the work of the scholar"; and he knew the difficulties of striving for personal security, even—or especially—during the Nazi years. In contemplating Schlegelberger, Radbruch submitted to both of the countervailing tendencies in pity, which pits humility and compassion, on the one hand, against irrational emotions and the erasure of personal boundaries, on the other.[127]

Second, Radbruch sympathized with Schlegelberger's self-defense because he desperately wanted to hold on to the values of traditional institutions. In that vein, Radbruch had earlier written of the university professor's "most beautiful" title, a position "always based on quality."[128] Similarly, he never lost his affection for the Justice Ministry. He now looked back fondly on its "sublime artists of justice, exacting engineers of law, careful word engravers."[129] Schlegelberger needed some absolution because he had emerged out of Radbruch's beloved Justice Ministry.

125. See fn. 20.

126. "The Justice Case," 1087.

127. See generally Ruth Kaplan, "The Problem of Pity in Spenser's 'Ruines of Time' and 'Amoretti,'" *Spenser Studies: A Renaissance Poetry Annual* XXIX (2014): 263–94, 267–69.

128. See fn. 40.

129. Radbruch, "Des Reichsjustizministeriums Ruhm," 121.

Finally, Radbruch sympathized with Schlegelberger's self-defense because of his new religiosity and his conflation of that religiosity with jurisprudence. The result was that Radbruch could more easily bypass legal issues and instead seek moral answers. One vivid passage implies that he could only imagine improving jurisprudence with religion. In drawing lessons from Schlegelberger's tragic mistakes, Radbruch wrote that when the state becomes a "band of bandits"—in the words of Augustine of Hippo—"then only the *belief* in higher values can help, then the hot flames of *justice* must burn through all considerations and fears."[130] Was Radbruch not relying on "belief," and religion? Was he not countering Nazi evil with "justice," and jurisprudence? Could he no longer articulate, or imagine, that the "hot flames of justice" might not only induce judicial decisions but also ignite political action? Was he accommodating tyranny by responding to injustice with religion and jurisprudence instead of exploring the possibilities of political power?

Radbruch's essay, "The Glory and the End of the Reich Ministry of Justice," never exerted the influence of his more well-known essay, "Statutory Injustice and Suprastatutory Law." In regard to the later essay's immediate precipitant, the Nuremberg Judges' Trial, German jurists succeeded in limiting distribution of the decision and squelching discussion of its issues, and the trial quickly receded from sight.[131] Radbruch did little to counter these eventualities. True enough, soon after the Judges' Trial verdict he privately expressed regret that, as a consequence of scanty press coverage, "the overall important results of the Nuremberg trials have not penetrated into the populace."[132] He failed to grasp, however, the character of his own essay: not only providing an early apology for Schlegelberger[133] but also expressing what had become, and continued to be, the typical defense of Nazi era jurists.[134] In probing for something redeeming in a man who had systematically, methodically, and persistently promoted policies to exterminate human beings, Radbruch accepted much of Schlegelberger's defense and recast it into an argument for extenuating circumstances. He restated the tensions between positive law and natural law as those between statutory guilt and suprastatutory mitigation—with the highest moral values residing in natural law

130. Ibid., 129 (emphasis added).

131. Kramer, "Das Nürnberger Juristenurteil," 62; and Marc von Miquel, *Ahnden oder Amnestieren?: Westdeutsche Justiz und Vergangenheitspolitik in den Sechziger Jahren* (Göttingen: Wallstein, 2004), 24.

132. Letter of January 11, 1948, to Franz und Ulrike Blum, in Radbruch, *Briefe II*: 264; Letter of February 6, 1948, to Friends in America and Boris Sapir, in ibid., 270–72; see also Letter of February 14, 1949, to Erich Ebermayer, in ibid., 296–97.

133. Nathans, *Schlegelberger*, 8–9.

134. See Müller, *Hitler's Justice*, 271.

and, perhaps implicitly, also in suprastatutory mitigation. Radbruch found tragedy in Schlegelberger because he had undertaken his murderous work with old school hauteur. In the end, this essay, like "Statutory Injustice and Suprastatutory Law," fit the needs of former Nazi jurists.

Taken together, Radbruch's essays "Statutory Injustice and Suprastatutory Law" and "The Glory and the End of the Reich Ministry of Justice" help complete the arc of Radbruch's career. At war's end, the demand of the day was rebuilding institutions: the university, the courts, and the Justice Ministry. Crowning a lifetime devoted to scholarship, Radbruch became the first rector of the University of Heidelberg's reconstituted law school, serving from November 1945 through August 1946, and then continuing to teach through July 1948.[135] His position gave him practical influence at a university, but not over courts. Yet both institutions faced similar crises of personnel, with universities lacking professors and courts lacking judges. The occupying powers barred vast numbers from service because of their Nazi pasts, at least through the spring of 1946.[136] To fill that void, Radbruch proposed not a plan for churning out new professors and new judges, but an approach for the re-education of former professors and judges. One by one, they could return to their old jobs by promising to adhere to new ideals. At the same time, however, they could evade responsibility for past misdeeds, especially the judges for prior judicial misconduct or criminal acts from the bench. Radbruch hardly noticed that these judges—insecure and ambitious, corrupted and self-righteous, vulnerable and aggressive—could, and would, mold his ideals in their own image.

Radbruch tried to get not only legal ideals back on their feet but also jurists. He extended a helping hand to people that he knew: law professors and civil servants. As for professors, he may have imagined recreating his romanticized vision of the earlier university, populated by those who had been fired and hired alike. Hardly having shed his democratic inclinations, he tried to help those who had earlier fled or lost their positions in the Nazi era.[137] But his actions showed an even stronger nationalist bent. He devoted as much, if not more, energy to those whom Allied de-Nazification left unemployed. For those fleeting figures of legal history who had taught, written, and advanced throughout the Nazi era, the evidence may be too scattered to know for sure whether this one or that one tested the limits for helping others or recoiled from taking risks, kept a distance from evil or pursued a career no matter

135. Remy, *The Heidelberg Myth*, 118–20; Schroeder, *Eine Universität,* 447–50, 629.

136. See, for example, von Miquel, *Ahnden oder Amnestieren?* 23–25; and Schroeder, *Eine Universität,* 624, 629.

137. Ibid., 356–57, 456, 461, 599, 603, 648–49; see also Remy, *The Heidelberg Myth*, 227.

what, acted with dignity or was flush with pro-Nazi enthusiasm. What the evidence does show is that Radbruch championed professional acquaintances even if they had earlier joined the Nazi Party, men such as Carl Emge, whom the American occupation government held in custody, or Karl Engisch, Ernst Forsthoff, Hermann Krause and Eugen Wohlhaupter, whom the Americans ousted from university positions.[138]

Nazi party membership was also no bar to Radbruch's special pleading for former civil servants—men with closer access than professors to inflicting direct injury and causing death. In congratulating Thomas Dehler on becoming West Germany's first justice minister, Radbruch put in a good word for Fritz Hartung, a former criminal law specialist in the Prussian Justice Ministry who needed a position and could help carry forward the old tradition of neutral, technical legal experts. Radbruch left out that Hartung had served on the panel of the German Supreme Court that had decided cases arising under the Nuremberg laws, interpreting them ever more expansively and severely.[139] Radbruch capped his sympathetic portrayal of Schlegelberger with a clemency petition for his subordinate, Wolfgang Mettgenberg, a co-defendant at the Justice Trial convicted for his role in the "Night and Fog" decree (and probably another acquaintance of Radbruch's). In one almost prideful private letter, Radbruch wrote that Mettgenberg erred at trial in arguing that the notorious decree was legally valid. That defense, Radbruch claimed, reflected the mentality of a rigorous positivist but was psychologically impossible for an Allied court to accept. Mettgenberg should have presented the true state of affairs, according to Radbruch, namely, "that the entire politics of the Reich Ministry of Justice was aimed at softening the implementation of the decree."[140]

138. Letters of July 5, 1945, to Lona Emge, in Radbruch, *Briefe II*: 241, 502; of January 20, 1946, to Carl August Emge, in ibid., 246, 505; of March 24, 1946, to Eugen Wohlhaupter, in ibid., 247; of August 20, 1946, to Agnes Schwarzchild, in ibid., 249 (re Engisch); see also Remy, *The Heidelberg Myth*, 138, 153, 158–59; Schroeder, *Eine Universität,* 491, 537–43, 552–55, 636; Michael Stolleis, "Book Review of Hans Hattenhauer, hrsg, *Rechstwissenschaft im NS-Staat: Der Fall Eugen Wohlhaupter* (Heidelberg, 1987)," in *Historische Zeitschrift* 247 (1988): 739–741.

139. Letter of September 22, 1949, to Thomas Dehler in Radbruch, *Briefe II*: 312–14, 545; Meinecke, "Conflicting Loyalties," 192–94; Müller, *Hitler's Justice,* 192.

140. Letter of October 4, 1948, to Vally Joël, in Radbruch, *Briefe II*: 289. Radbruch's literary estate also includes an undated seven-page draft of a purported "Expert Opinion" opposing the death sentence imposed in April 1948 at another Nuremberg successor trial, the *Einsatzgruppen* (Mobile Killing Unit) case, against Eugen Steimle, an SS commanding officer convicted of having murdered at least 500 people. Sympathetically construing the trial evidence summarized in the written decision, Radbruch essentially argued that the evidence was insufficient to prove Steimle's guilt. Universität-Bibliothek Heidelberg, Heid. Hs. 3716: Nachlass Gustav Lambert Radbruch.

Thus, Radbruch's affections for tainted institutions and their compromised members—whether for universities and their professors, the courts and their judges, or the Justice Ministry and its civil servants—seeped into the legal positions he developed for public consumption. The irony in the postwar Radbruch is the discordance between his decency and his legal doctrine. Horrified at evil, he indulged professional evildoers, and, in indulging such evildoers, he could not imagine how anyone in the past might have resisted evil through law; through positive law and legal institutions.

IX. Conclusion: The Shortcomings of the Postwar Radbruch

Captivated by jurisprudence rather than politics, Radbruch missed the politics in his own jurisprudence. One problem that may have afflicted him—or us as historians and lawyers—is an unwarranted assumption. Why assume that a sense of humanity, which Radbruch surely had, must be fundamental? A sense of humanity may be secondary to politics. It may obscure, distract from, and diminish political thinking.

After World War II, Radbruch's reputation and good will endowed his reflections with gravitas. Contemporaries and later scholars have admired a revived spirit who, despite years of quiescence and physical debility, energetically engaged a dawning era. From that perspective, Radbruch's historical misinterpretation of the Nazi judiciary was incidental; it was not essential for restoring legitimate government. His neglect of anti-Nazi resistance was beside the point; it was irrelevant to his new project. But few have entertained the possibility that the postwar Radbruch was not only a revived spirit but also a broken man. Yet he *was* a broken man. Or he was also a broken man. Or he was, at least, a man who could not repair the break that Nazism had caused in his life and thought. The Nazi era broke, if not his ability to think politically, his political acumen. Perhaps with little choice, certainly confronted with unbearably hard choices, he succumbed to state intimidation. He fell silent. In his quest to sustain himself—through his love of jurisprudence, literature, and scholarship, and also in his turn toward religion—he lost political vitality. His misinterpretation of the Nazi judiciary and neglect of anti-Nazi resistance go hand in hand because they both reflected an atrophied political imagination.

Radbruch did not realize how badly the Nazi era had damaged his political imagination, sensitivity, and judgment—or his jurisprudence. Trying to integrate his lifelong compassion, his horror at recent Nazi atrocities, and his loss at conceiving what anyone in Nazi Germany could have done to resist, he sought a reorientation through natural law. But he did not

solve the problem that he had recognized in his pre-Nazi jurisprudence: the impossibility of knowing the content of natural law, that is, of translating its high principles into concrete statutes, regulations, and decisions.[141] He seems to have forgotten the earlier Weimar era warnings of Social Democratic contemporaries, such as Franz Neumann and Hans Kelsen, that the indeterminacy in the concept of natural law invites thinkers to abuse its language of morality, universalism, and absolutes and, rather, to call on natural law for advancing their own ideology, most often a conservative or reactionary one.[142]

By invoking natural law, Radbruch hardly provided obvious answers to the type of moral dilemmas that the Nazi era generated. Even if Schlegelberger, for example, had been the respectable, upstanding, well-meaning Justice Minister that Radbruch envisioned, what, by Radbruch's lights, should Schlegelberger have done? Radbruch implied that Schlegelberger should have tried to use the law to good effect, even with compromises—up to a point. At that point, morality demanded that he stop. He should have done what Judge Kreyssig did: use law to save lives as long as possible and then resign. Or he should have done what Radbruch himself did (even if in part from force of circumstances): do nothing rather than participate in evil. Radbruch's approach is a jurist's idea of comfort. It announces principles for the ages in grappling with the demands of the moment, the peculiar demands of the present moment, not of past realities or future contingencies. The approach is better at assuaging individual conscience than in securing political effectiveness.

In terms of political effectiveness, even in times of crisis, or especially in times of crisis, natural law is no better than positivism, or maybe vice versa. In his attempts to assess positive law and natural law, Radbruch failed to appreciate a trap set by the Nazi regime: its ruthless power could always defeat law, any kind of law, whether positive or natural.[143] The trap snapped shut on Radbruch because he was too much the legal scholar, preoccupied with his own theory of jurisprudence, his own tripartite scheme, and his own high-wire act of balancing between positive and

141. Radbruch, *Rechtsphilosophie*, 108, 178–79; see also Kühl, "Rückblick auf die Renaissance," 337; Ward, *Law, Philosophy and National Socialism*, 188.

142. See Douglas G. Morris, "Write and Resist: Ernst Fraenkel and Franz Neuman on the Role of Natural Law in Fighting Nazi Tyranny," *New German Critique* 126 (2015): 197–230.

143. See generally Ernst Fraenkel (trans. Edward A. Shils), *The Dual State: A Contribution to the Theory of Dictatorship* (New York: Oxford University Press, 1941); and Ernst Fraenkel, *Der Doppelstaat*, 2nd ed., ed. Alexander von Brünneck (Hamburg: Europäische Verlagsanstalt, 2001).

natural law.[144] In the postwar years, during his last days, with his final burst of energy, he embraced what he knew best, jurisprudence, in a time that needed what he grasped poorly, politics.

Politically, Radbruch stood out in the war's aftermath among his cohort of prominent Social Democratic jurists. He exerted far more immediate influence in Germany than others, all in real emigration, such as Hans Kelsen, who wrote one of the most devastating critiques ever on natural law; or than Franz Neumann, who struggled with the significance of natural law but in the half-decade after the war looked to the Allies to keep the German judiciary on a tight leash; or than Ernst Fraenkel, who in the late 1930s already relied on natural law as a justification for anti-Nazi resistance and returned to it again in the 1950s as a foundation for Western democracies, but left the subject alone in the late 1940s.[145] Rather, the man of the hour was Gustav Radbruch, the one Social Democrat, who after years of personal grief, professional demoralization, and political waning wound up nourishing a conservative consolidation in German jurisprudence. Radbruch's legacy is of a decent man who did not shape an era but met the needs of its desperate but powerful elite of former Nazi era jurists. Perhaps there is the tragedy.

144. See ibid., 129.

145. See Morris, "Write and Resist"; see also, for example, Ernst Fraenkel (trans. E.A. Shils), *The Dual State*, Part II; Hans Kelsen, "The Natural-Law Doctrine before the Tribunal of Science," *The Western Political Quarterly* 2 (1949): 481–513; Franz Neumann, "German Democracy 1950," *International Conciliation* 28 (New York: Carnegie Endowment for International Peace, 1950), 251–96, 257–58, 263–64, 290; and Franz Neumann, "Military Government and the Revival of Democracy in Germany," *Columbia Journal of International Affairs* 2 (1948): 3–20, 6–8, 18–19.